DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-338
Title: Paul Renico, Warden, Petitioner
v.
Reginald Lett
Docketed: September 18, 2009
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (07-2174)
Decision Date: March 10, 2009
Rehearing Denied: May 29, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Aug 27 2009	Petition for a writ of certiorari filed. (Response due October 19, 2009)
Oct 19 2009	Brief of respondent Reginald Lett in opposition filed.
Oct 19 2009	Motion for leave to proceed in forma pauperis filed by respondent.
Oct 26 2009	Reply of petitioner Paul Renico, Warden filed.
Nov 4 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 30 2009	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 30 2009	Petition GRANTED.
Dec 3 2009	Motion to appoint counsel filed by respondent Reginald Lett.
Jan 4 2010	SET FOR ARGUMENT ON Monday, March 29, 2010.
Jan 14 2010	Brief of petitioner Paul Renico, Warden filed.
Jan 19 2010	Motion to appoint counsel filed by respondent GRANTED. and Maria R. McCowan, of Detroit, Michigan, is appointed to serve as counsel for the respondent in this case.
Jan 25 2010	Motion to dispense with printing the joint appendix filed by petitioner Paul Renico, Warden.
Feb 3 2010	Record received from U.S.C.A. for 6th Circuit. (1 Binder)
Feb 12 2010	The time within which to file respondent's brief on the merits is extended to and including February 19, 2010.
Feb 19 2010	Brief of respondent Reginald Lett filed. (Distributed)
Feb 22 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Feb 23 2010	CIRCULATED.
Mar 12 2010	Record for U.S.D.C. for Eastern District of Michigan is electronic.
Mar 22 2010	Reply of petitioner Paul Renico, Warden filed. (Distributed)

Mar 29 2010 Argued. For petitioners: James Scott Ballenger, Washington, D. C.; and Anthony Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondents: David C. Frederick, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

No. 09-338 AUG 27 2009

OFFICE OF THE CLERK

In the Supreme Court of the United States

PAUL RENICO, WARDEN,
Petitioner,

v

REGINALD LETT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

PARTIES TO THE PROCEEDING

Petitioner is Paul Renico, Warden of the Mid-Michigan Correctional Facility in Michigan. Petitioner was respondent-appellant in the U.S. Court of Appeals for the Sixth Circuit.

Respondent is Reginald Lett, a prisoner in a State correctional facility in Michigan, serving a sentence of 16-40 years' imprisonment for second-degree murder and felony-firearm. Respondent was the petitioner-appellee in the Sixth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

INTRODUCTION 3

STATEMENT OF THE CASE 5

1. The State Court Trial and Review in the State Appellate Courts 5

2. The Habeas Review in Federal Court 9

REASONS FOR GRANTING THE PETITION 11

I. The decision of the Sixth Circuit creates a conflict among the circuits on the issue of what standard to apply in evaluating manifest necessity determinations. 11

II. The Sixth Circuit's opinion conflicts with this Court's precedent, existing for 185 years, that trial courts possess broad discretion to discharge for manifest necessity a hung jury 16

III. The fact that the circuits are split on this issue underscores the point that there is no clearly established precedent from this Court to enable the Sixth Circuit to conclude the Michigan Supreme Court's decision here was unreasonable under AEDPA, 28 U.S.C. § 2254. 21

IV. The Michigan Supreme Court's decision that the State trial court acted appropriately in granting a mistrial on manifest necessity was not an unreasonable application of existing Supreme Court precedent and was supported by the record – a factual conclusion that warrants deference under AEDPA, so that habeas review does not invade the province of the State courts 25

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Washington,
434 U.S. 497 (1978) ..... passim

Campbell v. Brunnelle,
925 F. Supp. 150 (S.D.N.Y. 1995) 15

Carey v Musladin,
549 U.S. 70 (2006) 21

Dreyer v. Illinois,
187 U.S. 71 (1902) 12

Fay v. McCotter,
765 F.2d 475 (5th Cir. 1985) 15

Green v. Johnson,
160 F.3d 1029 (5th Cir. 1998) 31

Illinois v. Somerville,
410 U.S. 458 (1973) 19, 20

Keerl v. State of Montana,
213 U.S. 135 (1909) 12

Klein v. Leis,
548 F.3d 425 (6th Cir. 2008) 30

Lindsey v. Smith,
820 F.2d 1137 (11th Cir. 1987) 15

Cases (continued)

Logan v. United States,
144 U.S. 263(1892) 12

Oregon v. Kennedy,
456 U.S. 667 (1982) 12

People v. Lett,
466 Mich. 206; 644 N.W.2d 743 (2002) ..... passim

Richardson v. United States,
468 U.S. 317 (1984) 17, 20

Ross v. Petro,
515 F.3d 653 (6th Cir. 2008) 30

United States United States ex rel. Webb v. Court of Common Pleas,
516 F.2d 1034 (3d Cir. 1975) 15

United States v. Gordy,
526 F.2d 631 (5th Cir. 1976) 15

United States v. Lorenzo,
570 F.2d 294 (9th Cir. 1978) 14, 15

United States v. Perez,
22 U.S. (9 Wheat) 579 (1824) ..... passim

United States v. Sanford,
429 U.S. 14 (1976) 17, 20

Wade v. Hunter,
336 U.S. 684 (1949) 12, 18, 19

Cases (continued)

Weaver v. Thompson,
197 F.3d 359 (9th Cir. 1999) 31

Winston v. Moore,
452 U.S. 944 (1981) 16, 24, 25

Wright v. Van Patten,
128 S. Ct .743 (2008) 22, 23

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 ..... 2, 21

28 U.S.C. § 2254(d) 3, 21

28 U.S.C. § 2254(e)(1) 31

MCL 750.227b 5

MCL 750.317 5

Other Authorities

Antiterrorism and Effective Death Penalty Act. passim

OPINIONS BELOW

The decision of the Sixth Circuit, *Lett v. Renico,* affirming the district court's grant of habeas corpus is an unreported decision filed on March 10, 2009. Pet. App. 1a-17a. The order of the Sixth Circuit denying a motion for rehearing is unpublished. Pet. App. 76a. The district court decision granting habeas is published at 507 F.Supp.2d 777 (E.D. Mich. 2007). Pet. App. 18a-38a.

For the State court decisions, the decision of the Michigan Supreme Court in *People v. Lett* is reported at 466 Mich. 206; 644 N.W.2d 743 (2002). Pet. App. 39a-67a. The decision of the Michigan Court of Appeals is unpublished. Pet. App. 68a-75a.

JURISDICTION

The State of Michigan filed a motion for rehearing with a suggestion for rehearing en banc of the Sixth Circuit's March 10, 2009 decision, which was denied by that Court in a May 29, 2990 order. Pet. App. 76a. This Court has jurisdiction to review this writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit found that there was a violation of the right against double jeopardy under the Fifth Amendment.

The Fifth Amendment prohibits a person from being "twice put in jeopardy of life or limb."

The prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

There are four reasons why the Court should grant this petition.

First, there is a split of authority among the circuits about whether a jury that has deliberated for four hours and indicated that it is deadlocked is by itself sufficient to demonstrate manifest necessity in discharging the jury or whether the State trial court must employ additional measure to ensure that the jury is deadlocked. At least three other circuits have found similar lengths of deliberations without a verdict to warrant a finding of manifest necessity. And at least two circuits have reached the conclusion that the Sixth Circuit did here – albeit in direct review – in cases that were factually similar to this one. The question about whether a relatively short period of deliberations followed by a statement that the jury is deadlocked requires the trial court to take additional actions to confirm that the deadlock is genuine should not depend on where the trial occurs.

Second, the Sixth Circuit's opinion conflicts with this Court's precedent, existing for 185 years. It has been an unchanging principle that trial courts possess broad discretion to discharge for manifest necessity a hung jury and to ensure the trial process protects the ends of public justice.

Third, the disagreement among the circuits on the issue about what standard to apply in evaluating manifest necessity determinations evidences the fact that there is no clearly established Supreme Court precedent on this point. The AEDPA statute, 28 U.S.C. § 2254(d), requires that the State court's decision be an

unreasonable application of clearly established Supreme Court precedent. The fact that the Sixth Circuit cited no authority from this Court to support its contention that there is a need for the trial court to take additional steps in making the manifest necessity determination is indicative of the fact there is no clearly established precedent from this Court.

Fourth, the Sixth Circuit decision was wrongly decided. The jury was deadlocked and the discharge of the jury because of manifest necessity was correct. The Sixth Circuit engaged in a classic case of second-guessing and did not accord the State court determinations the required deference on AEDPA. In doing so, the Sixth Circuit usurped the role of the State courts.

Finally, the State of Michigan would note that it has filed four other petitions for certiorari this year. See *Preselink v. Avery* (08-1389); *Metrish v. Newman* (08-1401); *Berghuis v. Smith* (09-1402); and *Berghuis v. Thompkins* (08-1470). All are murder cases, all published, all reaching disposition in 2009, in which the State of Michigan contends that the Sixth Circuit failed to accord the State court decisions with the proper level of deference required by AEDPA. These cases evidence a pattern by the Sixth Circuit of usurping the role of the State courts by failing to properly apply the AEDPA. This failure has dramatic consequences for this case by wrongly vacating Lett's second-degree murder conviction and prohibiting reprosecution under the Double Jeopardy Clause. This Court should grant this petition.

STATEMENT OF THE CASE

1. The State Court Trial and Review in the State Appellate Courts

Respondent was convicted by a State jury of second-degree murder under MCL 750.317 and possession of a firearm during the commission of a felony, MCL 750.227b. Respondent was sentenced to consecutive terms of 16-to-40 for the second-degree murder conviction and two years for the felony firearm conviction. This conviction resulted from his second jury trial. In the first, the State trial court declared a mistrial and discharged the jury after determining that the jury was deadlocked and unable to reach a verdict.

The Michigan Supreme Court provided a succinct description of the crime. "On August 29, 1996, Adesoji Latona, a taxi driver, was fatally shot at a Detroit liquor store. Latona was apparently confronted by a group of men, including defendant [i.e., Reginald Lett], as he entered the liquor store. One of the men, Charles Jones, accused Latona of throwing him out of Latona's cab, and an argument ensued inside the store. Latona's girlfriend testified that she saw [Lett] draw a gun, after which she heard two gunshots. In a statement given to police following the incident, [Lett] admitted that he was at the party store at the time of the shooting and that he and Jones had fought with Latona inside the store. [Lett] further stated that he had retrieved a gun from another friend in the parking lot, and that he went back inside and fired the gun into the air before running back outside. Latona died from two gunshot wounds, one to the head and one to the chest."[1]

---

[1] *People v. Lett*, 644 N.W.2d 743, 744-745 (2002), Pet. App. 40a-42a

In the first jury trial, the evidence was presented to the jury over the span of four days of testimony (June 3, 1997; June 5, 1997; June 11, 1997; and June 12, 1997), not including the voir dire and the deliberations. In two of these days, the jury was only present for two hours or less, and the total length of the trial on these four days comprised about ten hours of testimony, not including lunch breaks.[2]

The jury was instructed and began deliberating at 3:24 p.m. on June 12, 1997. Pet. App. 91a. The jury was excused for the day at 4:00 p.m. Pet. App. 318a. The jury resumed deliberations on June 13, 1997. Early on the second day of deliberations, the jury sent out a noted indicating that it had "a concern about our voice levels disturbing other proceedings that might be going on."[3] During its deliberations, the jury sent out a total of seven notes.[4]

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[2] The trial testimony on June 3, 1997 began at 11:00 am where the jury was empanelled and concluded that day at 11:59 am, for a total of one hour. Pet. App. 78a-80a. On June 5, 1997, the jury began on the record at 10:18 am, and the court adjourned at 4:15 am. Pet. App. 81a, 85a. The jury broke for lunch at 12:00 noon and returned at 2:55 pm. Pet. App. 82a-84a. This is approximately three hours of trial time. On June 11, 1997, the trial court went on the record at 10:44 am and adjourned at 12:30 am, for a total of approximately two hours. Pet. App. 87a-88a. Finally, on June 12, 1997, the trial commenced at 10:00 am and the jury began to deliberate at 3:24 pm. Pet. App. 89a, 91a. With the lunch break running from 12:31 pm to 2:19 pm, Pet. App. 90a, there were four hours of work conducted on this day before deliberations. These four days then totaled approximately ten hours of trial time.

[3] *Lett*, 644 N.W.2d at 746 n.2. Pet. App. 42a.

[4] *Lett*, 644 N.W.2d at 746 n.2. Pet. App. 42a.

At about 12:45 p.m., the jury returned to the courtroom based on another note, asking what would happen if the jury could not agree: "What if we can't agree? Mistrial? Retrial? What?"[5] The trial court concluded from the note that the jury may be deadlocked, and asked questions of the foreperson regarding the matter:

> THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves [sic], please?
>
> THE FOREPERSON: My name is Janice Bowden.
>
> THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.
>
> THE COURT: All right. Do you believe that it is hopelessly deadlocked?
>
> THE FOREPERSON: The majority of us don't believe that--
>
> THE COURT: (Interposing) Don't say what you're going to say, okay?
>
> THE FOREPERSON: Oh, I'm sorry.

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[5] *Lett*, 644 N.W.2d at 745-746. Pet. App. 41a-42a.

> THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?
>
> THE FOREPERSON: (No response)
>
> THE COURT: Yes or no?
>
> THE FOREPERSON: No, Judge. Pet. App. 93a-94a.

At this point, the trial court declared a mistrial and discharged the jury. Pet. App. 94a. There was no objection.

Reginald Lett was convicted on retrial of second-degree murder without objection or motion to dismiss on the basis of double jeopardy. Lett appealed his conviction to the Michigan Court of Appeals, arguing for the first time that the trial court erred in granting a mistrial because there was no manifest necessity. The Michigan Court of Appeals found that the grant of a mistrial was improper.[6] The Michigan Supreme Court reversed and reinstated the conviction. The Michigan Supreme Court affirmed the State trial court's decision, finding that the record substantiated the fact that the jury was not going to be able to reach a verdict.[7]

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[6] See *People v. Lett*, Michigan Court of Appeals, No. 209513, released on April 21, 2000. Pet. App. 73a-75a.

[7] *Lett*, 644 N.W.2d at 752, citing *Arizona v. Washington*, 434 U.S. 497, 515-517 (1978). Pet. App. 56a.

2. The Habeas Review in Federal Court

In habeas, the federal district court revisited this issue and disagreed with the Michigan Supreme Court's resolution:

> It is the state supreme court's determination that the record in this case demonstrates a "high degree" of necessity to declare a mistrial that the petitioner challenges, and with which this Court cannot agree. Pet. App. 29a.

This decision was based in part of the federal district court's factual analysis in which it found that "there is nothing in this record that lends support to the [State court's] conclusion that the jury was overwhelmed with disharmony or that it would not be able to reach a unanimous verdict given sufficient time" Pet. App. 34a. The district court granted habeas relief finding a violation of the Double Jeopardy Clause. Pet. App. 18a.-38a.

On appeal the Sixth Circuit again revisited the Michigan Supreme Court's conclusions and – over a dissent – indicated its belief that the jury was not *really* deadlocked and that the jury may well have reached a verdict if allowed to deliberate further:

> [I]t would be remarkable if the jurors had had time even to review the testimony of the seventeen witnesses in the brief span of three or four hours (broken into two days and punctuated by breaks), much less reach a conclusion that they were hopelessly deadlocked. The extremely

> serious nature of the crime and the potential punishment for the defendant also suggests that the jury should have been permitted more time to deliberate. Juries often initially report themselves deadlocked after several hours and then proceed to reach unanimous verdicts. Pet. App. 13a.

The Sixth Circuit affirmed the district court's grant of habeas relief. Pet. App. 15a.

REASONS FOR GRANTING THE PETITION

I. The decision of the Sixth Circuit creates a conflict among the circuits on the issue of what standard to apply in evaluating manifest necessity determinations.

The seminal Supreme Court case that has examined a trial court's decision to declare a mistrial based on a jury's inability to reach a verdict is *United States v. Perez.*[8] This Court expressly noted that where the jury is "unable to agree" and is discharged the Double Jeopardy Clause does not bar reprosecution:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right

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[8] *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

> to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.[9]

This case has been followed by other Supreme Court decisions in which the decision discharging the jury was based on the fact that the jury was unable to reach a verdict was upheld.[10]

In other cases examining reasons for granting a mistrial, this Court has noted that a defendant has a right to have his trial completed by a particular tribunal, but where there is manifest necessity, the Double Jeopardy Clause does not prohibit a second trial.[11] The standard manifest necessity is met where there is a "high degree" of necessity, and the situation where the jury is unable to reach a verdict is the "classic case" of manifest necessity.[12] "[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."[13]

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[9] *Perez*, 22 U.S. at 580.

[10] See, e.g., *Keerl v. State of Montana*, 213 U.S. 135, 137 (1909); and *Logan v. United States*, 144 U.S. 263, 296 (1892). See also *Dreyer v. Illinois*, 187 U.S. 71, 85 (1902)("It seems to be undisputed that the case was submitted to the jury at four o'clock in the afternoon and that the jury having retired to consider of their verdict were kept together until nine o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case").

[11] *Oregon v. Kennedy*, 456 U.S. 667, 671-672 (1982), citing *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

[12] *Arizona v. Washington*, 434 U.S. 497, 505-506, 509 (1978).

[13] *Washington*, 434 U.S. at 509.

This Court has explained that the trial court enjoys *"broad discretion"* about whether a deadlocked jury must be discharged based on manifest necessity because of the competing considerations of maintaining the particular tribunal and the fear of coercing that tribunal to reach a verdict:

> [I]n this situation there are especially compelling reasons for allowing the trial judge to exercise *broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury.* On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.[14]

That is, a State trial court, faced with a jury that appears to be unable to reach a verdict, must balance competing interests – the defendant's right of having his guilt determined by a particular tribunal, ensuring that the particular tribunal is not coerced into reaching a hasty verdict, and public's interest in a just judgment for those violating its laws. As a consequence, the trial court's decision to declare a mistrial is "accorded great deference" by an appellate court.[15] The trial court is in

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[14] *Washington*, 434 U.S. at 505-506 (emphasis added).

[15] *Washington*, 434 U.S. at 510.

the best position to assess all the factors in making this discretionary decision. But if the trial court acts for reasons unrelated to the hung jury, then "close appellate scrutiny is appropriate."[16]

In comparison to this case – four hours of deliberations for four days of testimony – with decisions of other circuits on direct review, the federal circuits have reached conflicting results.

Although there are factual variations, other circuits, on direct review, have found similar lengths of deliberations to be sufficient to warrant a declaration of manifest necessity. Specifically, in *United States v. Lorenzo,* the U.S. Court of Appeals for the Ninth Circuit determined that a jury deliberating for three hours was sufficient under *Perez* to warrant a mistrial where the jurors all stated that they would be unable to reach a verdict:

> Lorenzo's next claim of error is that he was impermissibly subjected to double jeopardy. After deliberating a little over three hours, the jury foreman reported that it would be impossible to arrive at a verdict. The district judge questioned each juror, and all agreed that there was no possibility that the deadlock could be overcome by further deliberations. As a result, the jury was discharged and Lorenzo was retried.
>
> * * *
>
> Here, the district court determined from questioning each member of the jury that it was their belief that their differences were

[16] *Washington,* 434 U.S. at 510 n 28.

> irreconcilable. Although it is true that the jury had been deliberating for only a little over three hours, the district court did not abuse its discretion in light of the jurors' belief that a verdict could not be reached and the fact that the brief trial itself presented no complex factual questions. See *United States v. Brahm*, 459 F.2d 546 (3d Cir.), cert. denied, 409 U.S. 873 [] (1972) (mistrial after five hours of deliberations in a two-day trial); *United States v. Cording*, 290 F.2d 392 (2d Cir. 1961) (mistrial after nearly four hours of deliberations).[17]

The Fifth and Eleventh Circuits also denied relief on double jeopardy grounds where the jury had only deliberated for three hours, both habeas cases.[18]

In contrast, other circuits on direct review have found that a comparable amount of time deliberating to be inadequate to justify a finding of manifest necessity.[19]

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[17] *United States v. Lorenzo*, 570 F.2d 294, 298, 299 (9th Cir. 1978).

[18] See *Fay v. McCotter*, 765 F.2d 475, 477 (5th Cir. 1985)("Although the jury deliberated for only three hours, the facts of the case were few and uncomplicated[.]"); *Lindsey v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987)("Where, as here, the jury twice returned to tell the trial court that it could not reach a verdict, the court did not abuse its discretion by declaring a mistrial, even though the jury had deliberated only three hours"). See also *Campbell v. Brunnelle*, 925 F. Supp. 150, 159 (S.D.N.Y. 1995)("Three hours of deliberation was not insufficient, and the more important factor is that the jury declared itself deadlocked").

[19] See *United States v. Gordy*, 526 F.2d 631, 636-637 (5th Cir. 1976) (abuse of discretion in declaring a mistrial after five and one-half hours where there was evidence that the mistrial was based on docket considerations); *United States United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034 (3d Cir. 1975)(abuse of discretion in declaring mistrial after six and one-half hours of

Here, the Sixth Circuit on habeas review concluded that State trial courts are constitutionally required to do more – employing additional requirements not mandated by this Court's clearly established precedent. In this regard, the circuits are split.

II. The Sixth Circuit's opinion conflicts with this Court's precedent, existing for 185 years, that trial courts possess broad discretion to discharge for manifest necessity a hung jury.

As discussed above, in *Perez* in 1824 and in cases following *Perez*, this Court has recognized that a trial court possesses the broad discretion to discharge for manifest necessity a hung jury. Retrial is therefore not prohibited by double jeopardy protections. Nothing in this Court's two-century long precedent has changed.

In fact, in a denial of a petition for certiorari in *Winston v. Moore*, Justice Rehnquist noted in his dissent, "[N]or do I know of a single case from this Court which has ever overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the 'manifest necessity' standard had not been met."[20] Moreover, in more recent cases where this Court has reviewed the manifest necessity determination from a deadlocked jury, it has concluded that the trial court's finding of manifest necessity did not constitute a double jeopardy violation when the defendants were retried.

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deliberations for six-day trial where the inquiry regarding the deadlock was at the judge's initiative).

[20] *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting).

In *United States v. Sanford*, a jury trial resulted in a hung jury, and the trial court declared a mistrial.[21] The district court dismissed the indictment, the government appealed, and U.S. Court of Appeals for the Ninth Circuit affirmed, after an intervening remand by this Court.[22] This Court in addressing the same issue here granted certiorari and summarily reversed in a per curiam opinion, finding the issue squarely controlled by *Perez*.[23]

Also in *Richardson v. United States,* the jury convicted the defendant on several of the counts but hung on others, and the trial court declared a mistrial.[24] In rejecting the defendant's double jeopardy claim, this Court relied on *Perez* and its progeny.[25]

The deference this Court has shown to the determinations of trial courts of manifest necessity for a hung jury is predicated, in part, on ensuring a fair process for all participants – the defendant and the prosecutor. As this Court noted in *Washington*:

> [Without] exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete

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[21] *United States v. Sanford,* 429 U.S. 14 (1976) (per curiam).

[22] *Sanford,* 429 U.S. at 14-15.

[23] *Sanford,* 429 U.S. at 16.

[24] *Richardson v. United States*, 468 U.S. 317, 318 (1984).

[25] *Richardson*, 468 U.S. at 323-326.

> opportunity to convict those who have violated its laws.[26]

Thirty years prior to *Washington,* this Court similarly recognized in *Wade v. Hunter* that a defendant should not automatically receive a windfall benefit when the jury deadlocks because the administration of justice would be frustrated:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the

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[26] *Washington,* 434 U.S. at 509.

> public's interest in fair trials designed to end in just judgments.[27]

The balancing of a defendant's right to have a trial completed by a particular tribunal is weighed against the interest in fair trial in which the jury is not compelled to reach a unanimous decision when there is disagreement about the verdict.[28]

These ends are seen in other double jeopardy contexts. For example, in *Illinois v. Somerville*, the defendant was indicted, the case was set for trial, and the jury was impaneled and sworn.[29] The prosecutor realized a fatal error in the indictment, and the error could not be remedied by amendment.[30] The trial court granted the State's request for a mistrial and the defendant was again indicted by the grand jury but without the error.[31]

In reversing the grant of habeas relief by the Seventh Circuit, this Court in *Somerville* noted that proceeding with the trial would have built in error, and a double jeopardy bar would have forced the matter to be resolved on appeal, before a second trial could take place, thus wasting the resources of all involved.[32] This Court concluded:

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[27] *Wade*, 336 U.S. 684 at 689.

[28] *Washington*, 434 U.S. at 509-510.

[29] *Illinois v. Somerville*, 410 U.S. 458, 459 (1973).

[30] *Somerville*, 410 U.S. at 459-460.

[31] *Somerville*, 410 U.S. at 460.

[32] *Somerville*, 410 U.S. at 460.

> Here, the trial judge's action was a rational determination designed to implement a legitimate state policy, with no suggestion that the implementation of that policy in this manner could be manipulated so as to prejudice the defendant. . . . Given the established standard of discretion set forth in *Perez*, *Gori*, and *Hunter*, we cannot say that the declaration of a mistrial was not required by "manifest necessity" or the "ends of public justice."[33]

The long-recognized judicial discretion and principles of fairness and public justice have no mechanical formula.[34]

Here, given the notes sent out by the jury, the record was clear that the initial note on June 13, 1997 indicated raised voices ("a concern about our voice levels"), that the later note suggested that the jury was unable to agree on a verdict, and the foreperson then state clearly that the the jury was deadlocked. In these circumstances, public justice would not be served by forcing the jury to reach a verdict out of duress. Like *Somerville* the trial court was rational and responsible, seeking a just judgment – for both Lett and the prosecutor. As in *Sanford* and *Richardson*, the principles set forth over a century and a half before in *Perez* recognize the trial court's discretion – discretion that is "accorded great deference" and "special respect."[35] The dissent here correctly recognized this discretion and that this Court's precedent has not mandated as a

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[33] *Somerville*, 410 U.S. at 460.

[34] *Somerville*, 410 U.S. at 462.

[35] *Washington*, 434 U.S. at 510.

constitutional requirement that a trial court engage in additional steps before reaching a decision that there is manifest necessity to declare a mistrial based on a hung jury.[36]

III. The fact that the circuits are split on this issue underscores the point that there is no clearly established precedent from this Court to enable the Sixth Circuit to conclude the Michigan Supreme Court's decision here was unreasonable under AEDPA, 28 U.S.C. § 2254.

28 U.S.C. § 2254(d) requires that the State court decision be an unreasonable application of clearly established Supreme Court precedent. The fact that the circuits are split on this issue demonstrates the lack of clearly established precedent from this Court. In its recent habeas jurisprudence, this Court has reiterated the point that in the absence of clearly established Supreme Court precedent, there is no relief under AEDPA.

In *Carey v. Musladin,* a California case on habeas review, this Court examined whether the displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[37] The Supreme Court initially noted that it had examined the

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[36] "A trial judges is in a far superior position to determine whether a jury is genuinely deadlocked and whether it is beneficial to the interest of justice to send the jury for further deliberations . . . [N]o Supreme Court holdings require specific findings on the record by a trial court and no Supreme Court holdings require proof that specific actions have been considered or taken prior to declaring mistrial due to a deadlocked jury." Pet. App. 16a.-17a. (Forester, J., dissenting).

[37] *Carey v Musladin*, 549 U.S. 70, 74 (2006).

question about possible error in the conduct of trials based on the State-sponsored conduct. It then noted that the lower federal courts had diverged in their decisions in applying this precedent, some applying it to the conduct of spectators, and others not. In light of this divergence, the Supreme Court concluded that there was no clearly established Supreme Court law for the State court to apply.[38] The Supreme Court thus reversed the Ninth Circuit, which had relied "on its own precedent" in determining that the Supreme Court cases that applied to State-sponsored conduct also governed the actions of spectators.[39] The point is that where the Supreme Court does not give a "clear answer" to the question presented, there is no basis on which to provide habeas relief.[40]

Recently, in *Wright v. Van Patterson*, this Court reinforced the limitation on habeas review when there is a lack of clearly established precedent. In *Wright*, the petitioner pled to reckless homicide. His attorney was not physically present at the plea hearing, but rather, participated by speakerphone. The petitioner subsequently moved to withdraw his plea, arguing that counsel's physical absence violated the Sixth Amendment – a claim that the State courts denied.

On habeas, however, the Seventh Circuit concluded the claim should have been resolved, not under *Strickland*, but under *Cronic*. This Court

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[38] *Musladin*, 549 U.S. at 76.

[39] *Musladin*, 549 U.S. at 74.

[40] *Wright v. Van Patten*, 128 S. Ct .743, 747 (2008)("Because our cases give no clear answer to the question presented, let alone one in [the defendant's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law"), citing *Musladin*, 549 U.S. 72 (internal quotes omitted).

remanded and, when the case returned unchanged, reversed. This Court explained that its precedents do not "clearly hold" *Cronic* should apply as the Court has never considered this unique factual question:

> No decision of this Court, however, squarely addresses the issue in this case, see *Deppisch*, *supra*, at 1040 (noting that this case "presents [a] novel . . . question"), or clearly establishes that *Cronic* should replace *Strickland* in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence . . . . Our cases provide no categorical answer to this question, and for that matter the several proceedings in this case hardly point toward one.
>
> Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonably applied clearly established Federal law.'" *Musladin*, 549 U.S., at 127 S. Ct. 649, 651, 166 L. Ed. 2d 482, 486) (quoting 28 U.S.C. § 2254(d)(1)). Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.[41]

Such is the case here.

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[41] *Van Patten*, 128 S. Ct. at 746-747).

The Sixth Circuit cited to no decision from this Court that requires a State trial court to employ constitutionally-mandated, additional procedures to ensure that the jury is in fact deadlocked or that a specified amount of time for deliberations is required before the State court decision is insulated from second-guessing on habeas review. The dissenting judge in the Sixth Circuit correctly recognized this point. Pet. App. 16a-17a (Forester, J., dissenting).

In his dissent in *Winston*, a habeas case, Justice Rehnquist recognized the convergence of the layers of deference and this lack of precedent to second-guess State decisions in this area. Again, there is no precedent from this Court that has overturned the declaration of a mistrial after a jury has deadlocked:

> In sum, I am reluctantly led to the conclusion that the District Court did one of two things in order to grant the relief that it did, and that either of them merit review by this Court. Either it simply "second-guessed" the state trial judge as to whether this particular jury could, after further deliberation, reach a verdict, or it created a principle of law that has never been sanctioned by this Court to the effect that a trial judge must interrogate each juror as to the possibility of reaching a verdict before it may declare a mistrial because the jury has "hung." Either one of these actions, with their concomitant affirmance by the Court of Appeals, merits plenary review here.

> In my view, the determination of "manifest necessity" is one uniquely vested in the discretion of a trial judge, and particularly should not be subject to attack by a habeas action after trial counsel had failed to object to the declaration of a mistrial.[42]

Habeas corpus is an inappropriate proving-ground for establishing novel constitutional principles, especially in light of the 185 years of precedent and the strictures upon the scope of habeas review under AEDPA – years after Justice Rehnquist's observations. The petition here fits these observations, even down to the lack of trial counsel's objections to the mistrial, and in fact, the jury in *Winston* deliberated for a shorter period.[43]

IV. The Michigan Supreme Court's decision that the State trial court acted appropriately in granting a mistrial on manifest necessity was not an unreasonable application of existing Supreme Court precedent and was supported by the record – a factual conclusion that warrants deference under AEDPA, so that habeas review does not invade the province of the State courts.

The Michigan Supreme Court cited and applied the proper constitutional standards in evaluating the State trial court's action.[44]

The Court engaged in a reasoned application of the record and concluded that the trial court acted

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[42] *Winston*, 452 U.S. at 946-947.

[43] *Winston*, 452 U.S. at 947.

[44] *Lett*, 644 N.W.2d at 747-753. Pet. App. 45a-61a.

within its discretion in finding that the jury was deadlocked and would not be able to reach a verdict:

> The jury had deliberated for at least four hours following a relatively short, and far from complex, trial. The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated. Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict. We conclude that, in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. Accordingly, manifest necessity for the jury's discharge existed, and defendant's retrial did not constitute a constitutionally impermissible successive prosecution.[45]

In other words, the Michigan Supreme Court determined that the record was adequate to explain the basis for the trial court's decision – "[t]he reasons were plain and obvious: the jury foreperson indicated that the jury was not going to be able to reach a unanimous verdict."[46] This decision was supported by the record and was not an unreasonable application of existing Supreme Court precedent.

In examining the State trial court's decision, the Sixth Circuit here determined that the State trial court

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[45] *Lett*, 644 N.W.2d at 753. Pet. App. 59a-60a.

[46] *Lett*, 644 N.W.2d at 754. Pet. App. 61a

acted precipitously and pressured the foreperson to "acquiesce" to the State trial court's conclusion that it was deadlocked:

> It is possible that the foreperson was attempting to tell the judge whether or not a majority of the jurors believed the jury was deadlocked. Rather than pausing to inquire about such a possibility or to poll the jurors individually, the judge forced the foreperson to provide an immediate answer on behalf of the whole jury. When the foreperson hesitated, the judge demanded a "yes or no" answer. *This insistence on haste and refusal to allow the foreperson to elaborate, combined with the judge's already-expressed opinion that the jury was deadlocked, exerted inappropriate pressure to acquiesce in the judge's conclusion.* [Pet. App. 12a (emphasis added).]

For this reason, over a dissent, the panel majority concluded that the Michigan Supreme Court's decision was "objectively unreasonable." Pet. App. 12a.

But the Sixth Circuit's analysis is improper because it presupposes that the expression of the deadlock was not in fact a deadlock previously reached. The weakness of the Sixth Circuits' analysis therefore is in its failure to accept the statement of the foreperson that the jury was deadlocked. The majority indicated their belief that the jury was not *really* deadlocked and that the jury may well have reached a verdict if allowed to deliberate further:

> [I]t would be remarkable if the jurors had had time even to review the testimony of the seventeen witnesses in the brief span of three or four hours (broken into two days and punctuated by breaks), much less reach a conclusion that they were hopelessly deadlocked. The extremely serious nature of the crime and the potential punishment for the defendant also suggests that the jury should have been permitted more time to deliberate. Juries often initially report themselves deadlocked after several hours and then proceed to reach unanimous verdicts. [Pet. App. 13a.]

But this analysis does not cite any authority.

This is classic second-guessing that directly contravenes the deference accorded State-court decisions under AEDPA. The State trial court had already received a note suggesting that there was disagreement regarding the verdict "What if we can't agree? Mistrial? Retrial? What?"[47] And there also was an earlier note regarding "raised voices," which the Michigan Supreme Court noted may be suggestive that the deliberations had already become "acrimonious."[48] Only in light of these notes did the foreperson confirm that the jury was not going to reach a verdict. The State trial court's decision to then grant a mistrial was within its discretion.

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[47] *Lett*, 464 N.W.2d at 745 n 2. Pet. App. 42a.

[48] *Lett*, 464 N.W.2d at 745 n 2. Pet. App. 43a.

The majority in the Sixth Circuit did not defer at all to the State trial court's superior ability to weigh these factors, deference that this Court requires the reviewing court to accord:

> It should be noted, however, that the rationale for this deference in the "hung" jury situation is that the trial court is in the best position to assess all the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate.[49]

Instead, the majority relied on its post hoc view that the jury should have deliberated longer. But if the jury had been required to deliberate further – and these raised voices were indicative of "particularly heated" discussions – the decision to continue to deliberate may have reached a verdict only "from pressures inherent in the situation."[50] Because the majority of the Sixth Circuit assumed that the jury should have deliberated longer, it discounted that further deliberations could have resulted in a coercive setting. The State trial court was in a better position to make the determination whether there was any risk of coercion. The Sixth Circuit majority's assumption is also belied by the fact that Lett was convicted on retrial of murder after only three hours and fifteen minutes of deliberations.[51]

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[49] *Washington*, 434 U.S. at 510 n 28.

[50] *Washington*, 434 U.S. at 505-506.

[51] *Lett*, 644 N.W.2d at 746 n 4. Pet. App. 43a.

Moreover, once the foreperson indicated that the jury was deadlocked, there is no established Supreme Court precedent that would require the State trial court to consider other alternatives, such as giving an instruction to require the jury to continue to deliberate. The Supreme Court in *Washington* rejected the Ninth Circuit's analysis, which had required the State trial court to consider other alternatives before declaring a mistrial.[52] The Sixth Circuit in its other cases also acknowledged that there is no such requirement before declaring a mistrial.[53] Once the foreperson revealed the fact that the jury was deadlocked, there were two options: either declare a mistrial or require the jury to continue to deliberate. Contrary to the suggestion of the Sixth Circuit, a decision by the State trial court to require the jury to deliberate in the face of the foreperson informing the State court of a deadlock may have resulted in the jurors pressuring one another. Granting the State trial court the proper deference, the Sixth Circuit could not have reached the decision of the State trial court was "irrational" or "irresponsible" under *Washington*.[54] The Sixth Circuit would also not have determined that the Michigan Supreme Court's decision was objective unreasonably.

This deference is even more significant here where all State factual determinations are presumed to be correct

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[52] *Washington*, 434 U.S. at 503.

[53] See *Klein v. Leis*, 548 F.3d 425, 431 (6th Cir. 2008)("In determining whether a "manifest necessity" exists, Courts need not find an absence of alternatives but only a "high degree" of necessity"); *Ross v. Petro*, 515 F.3d 653, 660 (6th Cir. 2008).

[54] *Washington*, 434 U.S. at 514 ("Thus, if a trial judge acts irrationally or irresponsibly, his action cannot be condoned")(citations omitted).

unless there is a contrary showing by clear and convincing evidence under 28 U.S.C. § 2254(e)(1). Given the nature of the decision here, the State trial court's determination whether the jury was deadlocked was a factual one entitled to a presumption of correctness. Other jurisdictions have noted the same basic point.[55]

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[55] See, e.g., *Weaver v. Thompson*, 197 F.3d 359, 363 n 6 (9th Cir. 1999); *Green v. Johnson*, 160 F.3d 1029, 1046 (5th Cir. 1998).

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

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APPENDIX TABLE OF CONTENTS

Page

United States Sixth Circuit Court of Appeals
Opinion dated March 10, 2009 ..... 1a-37a

United States District Court Opinion and
Order Granting Petition for Writ of
Habeas Corpus
dated February 23, 2006 ..... 18a-38a

Michigan Supreme Opinion
dated June 4, 2002 ..... 39a-67a

Michigan Court of Appeals
Opinion dated April 21, 2000 ..... 68a-75a

United States Sixth Circuit Court of Appeals
Order dated May 29, 2009 ..... 76a

Trial by Jury – Volume I transcript
pp 9-10, 37-38, 128, 134, 188 ..... 77a-85a

Trial by Jury – Volume II transcript
pp 196, 229-230, 267, 317-321 ..... 86a-95a

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-2174

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REGINALD LETT,	)	
	)	ON APPEAL FROM THE
Petitioner-Appellee,	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
v.	)	DISTRICT OF MICHIGAN
	)	
PAUL RENICO,	)	**OPINION**
	)	
Respondent-Appellant.)		

BEFORE: COLE and GIBBONS, Circuit Judges; FORESTER, Senior District Judge.*

COLE, Circuit Judge. Warden Paul Renico appeals from the district court's judgment granting Petitioner-Appellant Reginald Left a writ of habeas corpus. The district court determined that the state trial court's declaration of a mistrial and subsequent retrial violated Petitioner's right not to be placed twice in jeopardy. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

---

*The Honorable Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

I. BACKGROUND

The material facts are not in dispute. Lett was charged with first-degree murder and possession of a firearm during the commission of a felony in connection with the shooting death of Adesoji Latona at a liquor store in Detroit, Michigan. His first trial commenced on June 2, 1997, and though it spanned a period of ten days, it consisted of approximately ten hours of testimony in four days, not including voir dire and closing statements. The parties presented testimony from seventeen witnesses, either in person or through transcripts of prior proceedings. The trial judge instructed the jury on June 12, 1997. The jury began deliberating at 3:24 p.m. that day and was excused at 4:00 p.m. The jury resumed its deliberations the following morning. During the course of its deliberations, the jury sent seven notes to the trial judge These notes are not contained in the record, but according to the Michigan Supreme Court, "[m]ost of the notes were routine requests for evidence, instructions, and breaks." *People v. Lett*, 644 N.W.2d 743, 745 n.2, 753 (Mich. 2002). One note, "sent out early on the second day of deliberations, stated that the jurors had 'a concern about our voice levels disturbing any other proceedings that might be going on.'" *Id.* at 745 n.2. The last note stated, "What if we can't agree? Mistrial? Retrial? What?" *Id.* at 745. At 12:45 p.m., upon receiving this note, the trial judge called the jury into the courtroom and the following exchange took place:

> THE COURT: You may be seated. Is the jury present and properly seated, counsel?
>
> MR. HEAPHY [PROSECUTOR]: Yes, your Honor.
>
> MR. GORDON [COUNSEL]: Yes, Judge.

THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?

(The foreperson identified herself)

THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?

THE FOREPERSON: Yes, there is.

THE COURT: All right. Do you believe that it is hopelessly deadlocked?

THE FOREPERSON: The majority of us don't believe that --

THE COURT: (Interposing) Don't say what you're going to say, okay?

THE FOREPERSON: Oh, I'm sorry.

THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict or not?

THE FOREPERSON: (No response)

THE COURT: Yes or no?

THE FOREPERSON: No, Judge.

THE COURT: All right. I hereby declare a mistrial. The jury is dismissed.

(Jury discharged at about 12:48 p.m.)

(Trial Tr. 319, Joint Appendix "JA" 150.)

Subsequently, Left was retried on charges of first-degree murder and possession of a firearm during the commission of a felony ("felony-firearm"). The second jury convicted him of the lesser offense of second-degree murder under section 750.317 of the Michigan Compiled Laws and felony-firearm under section 750.227b of the Michigan Compiled Laws. Left was sentenced to sixteen-to-forty years' imprisonment.

On appeal to the Michigan Court of Appeals, Left claimed that his retrial violated the double jeopardy prohibitions in the Michigan and United States Constitutions because the trial judge's sua sponte termination of the first trial was without manifest necessity and without Left's consent. *People v. Lett,* No, 209513, 2000 Mich.App. LEXIS 1841 (Mich. Ct. App. Apr. 21, 2000). The Michigan Court of Appeals agreed and reversed the convictions. *Id.* at * 10. The Michigan Supreme Court, over a dissent, reversed the Court of Appeals. *Lett*, 644 N.W.2d at 750. It held that the retrial did not violate the double jeopardy bar because the record contained "sufficient justification" for the trial judge's conclusion that there was "manifest necessity" for a mistrial. *Id.* The Michigan Supreme Court found that the reasons for the trial judge's actions were "plain and obvious" from the record, so there was no need for the trial judge to articulate her reasoning. *Id.* at 754. Furthermore, it determined that, although a "deadlocked jury instruction might appropriately have been given, Lett did not request such an instruction, and a judge is not required to explain a decision to declare a mistrial on the basis of jury deadlock, nor to consider certain alternatives before making such a declaration. *Id.* at 752-53.

In habeas corpus proceedings under 28 U.S.C. § 2254, the United States District Court for the Eastern District of Michigan disagreed and granted Lett's petition for a writ of habeas corpus. *Lett v. Renico,* 507 F. Supp. 2d 777, 788 (ED. Mich 2007). The district court concluded that the trial judge's decision to declare a mistrial was not an exercise of sound discretion nor required by manifest necessity, and that the Michigan Supreme Court's conclusion to the contrary was an unreasonable application of federal law. The district court noted that the trial judge made no findings, provided no reasoning or justification, and entertained no argument from counsel.

II. DISCUSSION

A. Standard of review

We review de novo the district court's ruling on Lett's habeas petition. *See Abela v. Martin,* 380 F.3d 915, 924 (6th Cir. 2004). The standard set forth in the Antiterrorism and Effective Death Penalty Act of 1996, ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, governs our review:

> AEDPA prohibits a federal court from granting a writ of habeas corpus to a person in custody pursuant to a state court judgment with respect to a claim that was adjudicated on the merits in state court unless the adjudication of that claim --
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the

> facts in light of the evidence presented in the State court proceeding.

See Morales v. Mitchell, 507 F 916, 929 (6th Cir. 2007) (quoting AEDPA, 28 U.S.C. § 2254(d)) (internal quotation marks omitted). The phrase "clearly established [f]ederal law" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Id.* at 412-13. An "unreasonable application" of clearly established federal law occurs if a "state court identifies the correct governing legal rule from [the Supreme Court's] eases but unreasonably applies it to the facts of the particular state prisoner's ease." *Id.* at 407. "[A]n unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410. We ask, therefore, "whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409.

B. Double Jeopardy Analysis

"[T]he Supreme Court has recognized that the [F]ifth [A]mendment's prohibition against placing a defendant twice in jeopardy reflects a constitutional policy of finality for the defendant's benefit in all criminal proceedings, and is 'fundamental to the American scheme of justice." *Jones v. Hogg*, 732 F.2d 53, 54 (6th Cit 1984) (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)). According to the Supreme Court:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). A court may not force a defendant to undergo retrial on a matter that concluded without a conviction or acquittal unless there was "manifest necessity" for declaring a mistrial. *Arizona v. Washington*, 434 U.S. 497, 505 (1978). "Necessity" is not interpreted literally in this context; rather, "there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Id.* at 506. A trial judge's belief that a jury is "genuinely deadlocked" is the "classic basis for a proper mistrial." *Id.* at 509. Trial judges are "accorded great deference by [] reviewing court[s] in deciding whether a jury is deadlocked. *Id.* at 509. One reason for this deference is to ensure that trial judges do not feel compelled to "employ coercive means to break [an] apparent deadlock," but rather remain free "to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations" so as to avoid the "significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.* at 509-10.

While a trial judge's decision to declare a mistrial due to jury deadlock is accorded great deference, such a decision may only be upheld if it was based upon an exercise of "sound discretion." *See id.* at

514 (the recognition of great deference due to the trial judge "does not, of course, end the inquiry[;] . . . reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion in declaring a mistrial.'"). "[I]f the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for [great] deference by an appellate court disappears." *Id.* at 510 n.28, 514. "[D]iscretion does not equal license; the Fifth Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of 'necessary' mistrials were in fact to go unreviewed." *United States v. Sisk*, 629 F.2d 1174, 1178 (6th Cir. 1980).

1. "Sound discretion" as defined by the United States Supreme Court

Sound discretion, as defined in *Arizona v. Washington*, is "careful consideration to [a defendant's] interest in having the trial concluded in a single proceeding." 434 U.S. at 516. Sound discretion requires the trial judge to "evinc[e] a concern for the possible double jeopardy consequences of an erroneous ruling," *Id.* at 515. Sound discretion means acting "deliberately," "responsibly," and "careful[ly]" not "precipitately," "hast[ily]," and "improvident[ly]." *Id.* at 514 n.34, 515-16. While taking into account the views of counsel may not always be required, sound discretion is typified by giving "both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial." *Id.* at 515-16.

The Supreme Court has repeatedly made clear that the power to declare a mistrial may not be exercised cavalierly. Justice Story, in formulating the classic test for "manifest necessity," which required an exercise of "sound discretion," stated that while it was "impossible to define all the circumstances, which

would render it proper [to declare a mistrial] . . . the power ought to be used with the greatest caution. . . ." *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824). Since then, the Supreme Court has enforced the principle that a "judge must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate," *Jorn*, 400 U.S. at 486. In *Jorn*, the Supreme Court found a double jeopardy violation where the judge abruptly declared a mistrial upon learning that certain witnesses had 'lot received adequate warnings about self-incrimination. *Id.* at 486-87. The Supreme Court stated, "it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *Id.* at 487 (emphasis added); *see also Fulton v. Moore,* 520 F.3d 522, 528 (6th Cir. 2008) (stating that the *Jorn* decision "turned largely on the court's finding that the trial judge acted abruptly, gave no consideration to a trial continuance, and allowed the parties no opportunity to argue or even object"). That a mistrial may not be declared without caution, deliberation, and a consideration of the defendant's Fifth Amendment rights is clear from *Perez*, *Jorn*, and *Washington*.

2. This Circuit's application of the Supreme Court's "sound discretion" rulings

While we review the Michigan Supreme Court's decision to determine only whether it was objectively unreasonable in light of the holdings of the Supreme Court, we may look to this Court's prior decisions applying those holdings to determine whether the relevant legal principle has been clearly established.

See Smith v. Stegall, 385 F.3d 993, 998 (6th Cir. 2004); *see also Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007) ("While the principles of 'clearly established law' are to be determined solely by resort to Supreme Court rulings, the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue.").

In *Fulton v. Moore,* 520 F.3d at 529, we reviewed a habeas petition based on a double jeopardy claim and held that *Arizona v. Washington* sets forth three factors that determine whether a judge has exercised sound discretion in declaring a mistrial: whether the judge (1) heard the opinions of the parties' counsel about the propriety of the mistrial; (2) considered the alternatives to a mistrial; and (3) acted deliberately, instead of abruptly. In *Fulton*, we found an exercise of sound discretion, partly because the trial judge engaged in a "lengthy colloquy with the lawyers" about the need to postpone the trial and discussed with them the double jeopardy implications of a mistrial. *Id.* Similarly, in *Klein v. Leis*, 548 F 425, 433 (6th Cir. 2008), we applied the factors articulated in *Fulton* and found that, although the trial judge had not permitted argument on the propriety of a mistrial before declaring it, he had exhibited sound discretion because he had repeatedly warned the pro se defendant that his conduct was unacceptable and would result in a mistrial if not corrected.

In another double jeopardy habeas case, *Johnson v. Karnes*, 198 F.3d 589, 595 (6th Cir. 1999), we considered the actions of a state trial judge who had "pressured the prosecutor to make [a] decision [to request a mistrial] at that very moment and only allowed a very brief recess before listening to counsel's arguments regarding the mistrial." We found that the judge's hasty and impulsive declaration violated the requirement found in *Perez, Jorn, Washington*, and

other Supreme Court cases that a trial court must "'shoulder its *Perez* burden of sound discretion'" by exercising a "'degree of careful consideration and solicitude for the serious consequences attendant upon mistrials.'" *Johnson*, 198 F.3d at 595 (quoting *Glover v. McMackin*, 950 F.2d 1236, 1241 (6th Cir 1991)).

3. The record does not support a finding of sound discretion

In this case, the trial judge's actions exhibited haste and a lack of consideration for Lett's rights that fell short of the sound discretion required. The primary basis for the Michigan Supreme Court's finding that the trial judge exercised sound discretion was the jury foreperson's statement that the jury was not going to reach a unanimous verdict. However, a review of the colloquy in which this statement was made shows that the foreperson's response cannot carry the weight placed upon it by the Michigan Supreme Court. First, the judge inferred from the jury's note asking what would happen *if* they could not agree that the jury was *already* "hopelessly" deadlocked. The note—"What if we can't agree? [M]istrial? [R]etrial? [W]hat?"—was not a statement that the jury was hopelessly deadlocked, or even deadlocked at all. The note was asking the judge for more information, which suggests that the answer to the question would have impacted the deliberations as they continued.

Next, the judge improperly conflated deadlock with mere disagreement, stating: "I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?" Contrary to the judge's implication to the foreperson, mere disagreement, which is to be expected among deliberating jurors, is not equivalent to the type of genuine deadlock that justifies the drastic remedy of a mistrial. Then, instead of allowing the foreperson to

answer her question, the judge cut off her response, assuming—perhaps correctly and perhaps not—that the foreperson was about to state the breakdown of votes among the jurors. It is possible that the foreperson was attempting to tell the judge whether or not a majority of the jurors believed the jury was deadlocked. Rather than pausing to inquire about such a possibility or to poll the jurors individually, the judge forced the foreperson to provide an immediate response on behalf of the whole jury. When the foreperson hesitated, the judge demanded a "yes or no" answer. This insistence on haste and refusal to allow the foreperson to elaborate, combined with the judge's already-expressed opinion that the jury was deadlocked, exerted inappropriate pressure to acquiesce in the judge's conclusion. *Cf Johnson,* 198 F.3d at 595 (holding that it was inconsistent with sound discretion to demand an immediate decision from prosecutor about whether to seek mistrial). The instant the foreperson replied, the judge declared a mistrial and discharged the jury, affording counsel no opportunity to present their views. Even the prosecution later acknowledged that the judge's precipitous declaration "clearly was error." (Post Conviction Hr'g Tr,, July 7, 2000, JA 152-53.) For these reasons, the Michigan Supreme Court's conclusion that the trial judge exercised "sound discretion" and "careful consideration to [Lett's] interest in having the trial concluded in a single proceeding," as required by *Arizona v. Washington,* 434 U.S. at 516, was objectively unreasonable.

The Michigan Supreme Court also found that the jury's note reporting "concern about [their] voice levels disturbing [] other proceedings" supported the trial judge's finding of deadlock. *Lett,* 644 N.W.2d at 745 n.2, 753. The jury sent this note early on the second day of deliberations—in other words, near the beginning of its deliberations, since the first "day" of

deliberations lasted thirty-five minutes. Taking the note at face value, the jurors may simply have been concerned that they were disrupting other proceedings. Even accepting the Michigan Supreme Court's suggestion that the note indicated the deliberations had become "acrimonious," *id.* at 745 n.2, this note does not correct the serious problems arising from the judge's colloquy.

The Michigan Supreme Court also concluded that the length of the jury's deliberations was such that the trial judge could reasonably have concluded that it was genuinely deadlocked. *Id.* at 753. However, as the district court pointed out, it would be remarkable if the jurors had had time even to review the testimony of the seventeen witnesses in the brief span of three or four hours (broken into two days and punctuated by breaks), much less reach a conclusion that they were hopelessly deadlocked. The extremely serious nature of the crime and the potential punishment for the defendant also suggests that the jury should have been permitted more time to deliberate. Juries often initially report themselves deadlocked after several hours and then proceed to reach unanimous verdicts. The short amount of time the jury actually deliberated clearly did not constitute the "protracted and exhausting" experience that creates a "significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Washington*, 434 U.S. at 509-10.

The Michigan Supreme Court also relied on the fact that neither party objected to the mistrial declaration, *Lett*, 644 N.W.2d at 753, but this reliance is inappropriate in light of the facts of this case and the Supreme Court's holding in *Jorn*. In *Jorn*, the Supreme Court stated, "the trial judge acted so abruptly in discharging the jury that, had the. . .

defendant [been disposed] to object to the discharge of the jury, there would have been no opportunity to do so." 400 U.S. at 487. In reliance on *Jorn*, we have stated:

> Nothing in the record before us indicates a willingness of petitioner to acquiesce in the mistrial order. Although he did fail timely to object, it is apparent that such an objection would have been difficult, and probably futile. At no point before the actual declaration of the mistrial was it even mentioned on the record as a potential course of action by the court. The summary nature of the trial court's actions, a swift declaration followed by the immediate dismissal of the jury and adjournment of the court, rendered an objection both unlikely and meaningless.

See Glover, 950 F.2d at 1240 (citing *Jorn*, 400 U.S. at 487); see also *Jones v. Hogg*, 732 F.2d at 57 (granting habeas where record did not reflect exercise of sound discretion regardless of defendant's failure to object, stating "[c]onsent to a mistrial order should only be implied where the circumstances positively indicate a defendant's willingness to acquiesce in the order"). In light of *Jorn*, as well as *Glover* and *Jones*, the record in this case does not support a determination that the trial judge understood Lett to have acquiesced in her decision to declare a mistrial.

In addition, the three *Washington* factors distilled by this Court in *Fulton*, 520 F.3d at 529, all weigh heavily against a finding of sound discretion in this case. First, the trial judge declared a mistrial without pausing to hear from counsel, and the brief colloquy leading to the judge's declaration—lasting all of three minutes—was immediately followed by the dismissal of the jury, providing counsel no opportunity to object. Second, the record does not indicate that the

trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving a "deadlocked jury" instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate. Any of these courses of action would have been reasonable, given that the jury had only deliberated for three or four hours in this first-degree murder trial. Third, and most troubling, the judge's declaration was inexplicably abrupt, making it "abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial." *Jorn*, 400 U.S. at 487.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's determination that the Michigan Supreme Court was objectively unreasonable in finding that the trial judge exercised sound discretion in declaring a mistrial, and we **AFFIRM** the grant of a writ of habeas corpus.

FORESTER, Karl S., Dissenting

I agree with the well written majority opinion on all points except the majority's conclusion that the Michigan Supreme Court's decision to reinstate the defendant's conviction was an unreasonable application of clearly established federal law. Because I believe that the state supreme court's careful evaluation of whether the trial judge exercised "sound discretion" when she determined that the jury was deadlocked was not an unreasonable application of federal law, I respectfully dissent from that portion of the majority's opinion.

The Michigan Supreme Court looked to *Washington*, clearly established federal law, to determine how it should evaluate the case. It found that, even though the trial judge did not attempt to justify the declaration herself, the declaration of the mistrial was permissible because it was "clear and obvious" from the record that the jury was deadlocked. In support of this finding, the court cite the notes that the jury sent to the judge, including one asking whether the level of their voices had disturbed anyone and one asking what happened if they could not agree, and the discussion on the record between the judge and foreperson wherein the foreperson said that the jurors could not reach a unanimous verdict. This careful evaluation cannot be said to be "contrary to" or an "unreasonable application of" federal law.

A trial judge is in a far superior position to determine whether a jury is genuinely deadlocked and whether it is beneficial to the interests of justice to send the jury for further deliberations. This case involved relatively few and simple, although serious, charges and did not involve a great deal of testimony or evidence. Further, there is no evidence on the record that the trial judge was motivated to declare a mistrial

for reasons other than the interests of justice. Most importantly, when asked if the jury was "going to reach a unanimous verdict or not?" the jury foreperson responded, "No, Judge."

Petitioner asserts that the trial judge could have employed a host of other actions prior to granting the mistrial. While I agree that the trial judge could have done more to establish on the record the basis for her determination that the jury was genuinely deadlocked, no Supreme Court holdings require specific findings on the record by a trial court and no Supreme Court holdings require proof that specific actions have been considered or taken prior to declaring mistrial due to a deadlocked jury. Further, from a policy standpoint, an appellate court needs to be hesitant to second guess a trial judge who is in a difficult position — the trial judge does not want to coerce the jury into making a decision but also does not want to face acquittal motions based on double jeopardy if he/she improperly declares a mistrial. Given the standard of review under AEDPA and the Supreme Court's statement in Washington that an appellate court should give a trial judge's determination of jury deadlock "great deference," I believe that we should not disturb the trial judge's conclusion that the jury wag deadlocked.

Because I believe that the state trial court exercised sound discretion in its determination that the jury was deadlocked constituting manifest necessity to declare a mistrial and the Michigan Supreme Court's decision to reinstate the conviction was a proper application of federal law, I believe that the district court's decision to grant Petitioner a writ of habeas corpus should be reversed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REGINALD LETT,

Petitioner,

v.

Civil No. 04-10018
Honorable David M. Lawson

PAUL RENTCO,

Respondent.
_____/

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

The question presented by petitioner Reginald Lett's petition for writ of habeas corpus is whether the Michigan Supreme Court unreasonably applied United States Supreme Court precedent, specifically *Arizona v. Washington,* 434 U.S. 497 (1978), when it found that Lett could be subjected to a second trial for first-degree murder after a state trial judge declared a mistrial during Lett's first trial when the jury did not reach a verdict after four hours of deliberation and the judge failed to give any reason for doing so. Lett is a state prisoner currently confined at the St. Louis Correctional Facility in St. Louis, Michigan. In his petition for a writ of habeas corpus filed through counsel pursuant to 28 U.S.C. § 2254, Lett contends that his state court conviction of second-degree murder, Mich. Comp. Laws § 750.317, and possession of a firearm during the commission of a felony, Mich. Comp. Laws § 750.227b, following his second trial in 1997 violated the Double Jeopardy Clause. After reviewing the record, the Court concludes that the state trial judge's decision to grant a mistrial did not

amount to the exercise of sound discretion, there was no manifest necessity for terminating jury deliberations, and the state supreme court's conclusions to the contrary amount to an unreasonable application of federal law as determined by the Supreme Court. The Court, therefore, will grant the petition for writ of habeas corpus.

I

The petitioner's convictions arise from the shooting death of Adesoji Latona at a party store in Detroit, Michigan on August 29, 1996. Latona was a taxicab driver who apparently was confronted by a group of three men, including Lett, as he entered a liquor store in Detroit, Michigan. An argument broke out inside the store when one of the men in the group, Charles Jones, took issue with Latona's earlier action of throwing him out of the cab. Latona's girlfriend, Djuana Bradley, testified that Jones confronted Latona in the store. Other witnesses described Jones as being angry, and when Latona pushed Jones, a "tussle" ensued. Bradley and the petitioner tried to intervene, and Bradley said she saw the petitioner draw a gun. She ran to the back of the store and heard two gunshots.

Afterward, petitioner Lett gave a statement to the police in which he admitted that he was at the party store and saw Jones "[get] into it with this guy." Lett said that he retrieved a gun from the car outside when he saw Latona push Jones, and thereafter Lett went back into the store. Lett admitted that he and Jones had fought with Latona inside the store before Lett first went outside. When he saw the men still fighting upon reentering the store, Lett said he fired the gun once into the air, then he ran back outside.

The medical examiner testified at the first trial that Latona died from two gunshot wounds, one to the head and one to the chest.

Other witnesses testified at trial as well. Two other witnesses who testified at the preliminary examination could not be located for trial, and their prior testimony was read to the jury. The first trial spanned a ten-day period, and it appears from the record that testimony was taken intermittently over parts of four days, although the proceeding itself took place over parts of seven days. The trial judge instructed the jury on June 12, 1997 and sent the jurors out to begin deliberations at 3:24 p.m. that day. They were excused shortly thereafter at 4:00 p.m. The opinion filed by the Michigan Supreme Court in this case reports that during deliberations, the jury sent a total of seven notes to the trial judge, see *People v. Lett*, 466 Mich. 206, 209 n.2, 644 N.W.2d 743, 745 n.2 (2002), but the record in this court contains no evidence of that. Apparently, the jury returned to deliberate on June 13, 1997, although the record does not contain the time of day deliberations recommenced. It is clear, however, that shortly after noon on that same day, the jury returned to the courtroom to discuss a note inquiring what would happen if the jurors could not agree. The following then ensued:

> THE COURT: Let's bring the jury out.
> THE DEPUTY: Would you take your seats in the jury box, please?
> (At about 12:45 p.m. - jury returned)
> THE COURT: You may be seated. Is the jury present and properly seated, counsel?
> MR. HEAPHY: Yes, your Honor.
> MR. GORDON: Yes, Judge.
> THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your

situation at this time. So, I'd like to ask the foreperson to identify themselves, please.
THE FOREPERSON: My name is Janice Bowden.
THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?
THE FOREPERSON: Yes, there is.
THE COURT: All right. Do you believe that it is hopelessly deadlocked?
THE FOREPERSON: The majority of us don't believe that—
THE COURT: (Interposing) Don't say what you're going to say, okay?
THE FOREPERSON: Oh, I'm sorry.
THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict or not?
THE FOREPERSON: (No response)
THE COURT: Yes or no?
THE FOREPERSON: No, Judge.
THE COURT: All right. I hereby declare a mistrial. The jury is dismissed.
(At about 12:48 p.m. -jury discharged)
THE COURT: Well, Mr. Gordon snuck away before we could set a new trial date.
THE DEPUTY: He's coining back, Judge.
THE COURT: Okay. It is going to be November 24th. I'll remand. Set a pretrial.
THE CLERK: Do you want a pretrial date for June 27th?
THE COURT: Okay Take him in the back before we bring the jury out.
(At about 12:49 p.m. -jury discharged)
(At about 12:50 p.m. - proceedings concluded)

Trial. Tr, at 320-21 (June 13, 1997).

A second trial occurred in November 1997 before a different judge at which the defendant was convicted of felony firearm and the lesser offense of second-degree murder. The trial court subsequently sentenced the petitioner to sixteen to forty years imprisonment on the second-degree murder conviction and a consecutive term of two years imprisonment on the felony firearm conviction.

On appeal, the petitioner argued that there was no necessity to declare the mistrial after the case had been submitted to the first jury and therefore the second trial placed him in jeopardy twice, in violation of his constitutional rights. The Michigan Court of Appeals agreed, rejecting the State's argument that the petitioner had consented to the mistrial, finding instead that " trial court declared the mistral sua sponte and there is absolutely no indication in the record that defendant consented to this action." *People v. Lett*, 2000 WL 33423221, *2 (Mich. App. April 21, 2000) (unpublished). The court then determined that because the trial judge declared a mistrial without a hearing, consideration of any alternatives, giving the jury a "deadlock instruction," or even determining that the jury in fact was deadlocked, the mistrial was declared improperly and the retrial violated the petitioner's double jeopardy rights as guaranteed by the United States and Michigan Constitutions, and that court reversed his convictions. *People v. Lett*, 2000 WL 33423221 at *3-*4

The State appealed that decision to the Michigan Supreme Court. A majority of that court held that the retrial did not violate the constitutional bar against successive prosecutions because there was sufficient justification for the declaration of mistrial. The court reasoned that although the trial judge did not herself attempt to justify the decision to declare a mistrial, the record contained "sufficient justification

for the mistrial declaration." *People v. Lett,* 466 Mich. 206, 218, 644 N.W.2d 743, 750 (2002). The court endorsed the well-accepted proposition that a trial judge's decision to declare a mistrial upon determining that a jury is deadlocked is entitled to great deference, and consideration of alternatives or holding a hearing on the subject is not mandatory. *Id.* at 221, 644 N.W.2d at 75 1-52. Nor is it necessary to give the jury additional instructions to address the possible deadlock. *Id.* at 222-23, 644 N.W.2d at 752. The court then concluded:

> The jury had deliberated for at least four hours following a relatively short, and far from complex, trial. The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated. Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict. We conclude that, in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion.

Id. at 223, 644 N.W.2d at 753 (footnote omitted). Two justices dissented on the ground that the record contained no evidence that the trial judge exercised sound discretion in deciding to declare a mistrial, as United States Supreme Court precedent requires. *Id.* at 226-28, 644 N.W.2d at 754-55. The court reversed the state court of appeals and remanded the case to that court for consideration of other appellate issues not addressed by that court, which are not pertinent here. On remand, the Michigan Court of Appeals concluded that the remaining issue lacked merit and affirmed the petitioner's convictions. *See People v.*

Lett, 2002 WL 1797254 (Mich. App. Aug. 2, 2002) (unpublished). The Michigan Supreme Court subsequently denied leave to appeal. *See People v. Lett*, 467 Mich. 953, 656 N.W.2d 529 (2003) (table).

The petitioner filed the present petition for a writ of habeas corpus on January 29, 2004, raising as his sole claim the violation of his rights under the Double Jeopardy Clause. The respondent filed an untimely answer to the petition, despite extension of time sought and granted by this Court. The thrust of the respondent's arguments is that the petitioner consented to the mistrial, and the state courts' determination that a mistrial was justified by manifest necessity was reasonable.

II

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996), which govern this case, "circumscribe[d]" the standard of review federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims. *See Wiggins v. Smith*, 539 U.S. 510, 520 (2003). As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application

> of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. *Franklin v. Francis*, 144 F.3d 429, 433 (6th Cir. 1998). Mere error by the state court will not justify issuance of the writ; rather, the state court's application of federal law "must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520-21 (quoting *Williams v. Taylor*, 529 U.S. 362, 409(2000) (internal quotes omitted)). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(l) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct."); *see also West v. Seabold,* 73 F.3d 81, 84 (6th Cir. 1996) (stating that "[t]he court gives complete deference to state court findings of historical fact unless they arc clearly erroneous").

The Supreme Court has explained the proper application of the "contrary to" clause as follows:

> A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

> A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

Williams, 529 U.S. at 405-06.

The Supreme Court has held that a federal court should analyze a claim for habeas corpus relief under the "unreasonable application" clause of § 2254(d)(1) "when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case." *Id.* at 409. The Court defined "unreasonable application" as follows:

> [A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable.
>
> [A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law. . . . Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 409,410-11. *See also Davis v. Coyle*, 475 F.3d 761,766 (6th Cir. 2007); *King v. Bobby*, 433 F.3d 483,

489 (6th Cir. 2006); *Harbison v. Bell*, 408 F.3d 823, 828-29 (6th Cir. 2005); *Rockwell v. Yukins*, 341 F.3d 507, 512 (6th Cir. 2003) (en banc).

In this case, the petitioner seeks relief on the ground that his retrial after the declaration of a mistrial violated the Double Jeopardy Clause of the Fifth Amendment. The Fifth Amendment to the United States Constitution commands that no "person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction and protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *Ohio v. Johnson*, 467 U.S. 493, 497 (1984). The Double Jeopardy Clause also bars the State from making repeated attempts to convict an individual for an alleged offense, *United States v. Dinitz*, 424 U.S. 600, 606 (1976), and protects a defendant's right to have his trial completed by a particular tribunal, *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978). Jeopardy attaches in a criminal trial once the jury is impaneled and sworn. *Critz v. Bretz*, 437 U.S. 28, 38 (1978). The state courts acknowledged and discussed all of these basic tenets.

Similarly, the state courts observed, and the petitioner agrees, that when a criminal proceeding is terminated prior to a resolution on the merits, retrial is not automatically barred. However, once jeopardy attaches, prosecution of a defendant before a jury other than the original jury may proceed only if the defendant requests or consents to a mistrial or if there is a "manifest necessity" for a mistrial. *Arizona*, 434 U.S. at 505; *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824); *Watkins v. Kassu*, 90 F.3d 138, 141 (6th Cir. 1996).

The respondent argues before this Court that the petitioner consented to the mistrial declaration because he failed to object in the trial court. That argument was advanced in the state courts as well, and rejected. As mentioned earlier, the state court of appeals found as a matter of fact that the record contained no evidence of consent on the part of the petitioner, and the respondent has presented nothing to this Court that justifies upsetting that finding. See 28 U.S.C. § 2254(e)(l); *West*, 73 F.3d at 84. Therefore, because the petitioner neither requested nor consented to the mistrial in this case, the issue before the Court is whether manifest necessity existed for granting the mistrial. Compare *United States v. Gantley,* 172 F.3d 422, 429 (6th Cir. 1999) (explaining that "a defendant's failure to object to a mistrial implies consent thereto only if the sum of the surrounding circumstances positively indicates this silence was tantamount to consent," and finding consent only after the trial judge "(1) heard Gantley's counsel's suggestion that [trial judge]'s own reaction caused Gantley incurable prejudice; (2) considered the possibility of an alternative course of action; (3) decided there was no viable alternative to a declaration of a mistrial; and (4) essentially invited an objection by asking counsel if there was 'anything else' to address").

"Manifest necessity" is a term of art that has come to mean a "high degree" of neccessity. The Supreme Court explained:

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of eases. Nevertheless, those words do not describe a standard

> that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate.

Arizona, 434 U.S. at 505-06 (footnotes omitted).

It is the state supreme court's determination that the record in this case demonstrates a "high degree" of necessity to declare a mistrial that the petitioner challenges, and with which this Court cannot agree.

To be sure, the manifest necessity doctrine does not require a finding that the trial court had no alternative but to declare a mistrial. *Harpster v. State of Ohio,* 128 F.3d 322, 328 (6th Cir. 1997). A mistrial premised upon jury deadlock has been "long considered the classic basis for a proper mistrial." *Arizona*, 434 U.S. at 509; *see also Richardson v. United States,* 468 U.S. 317, 323-24 (1984). And reviewing courts must give considerable deference to a trial court's determination that manifest necessity warrants a mistrial, particularly in the context of a deadlocked jury. *Arizona*, 434 U.S. at 510-11. The United States Supreme Court has explained that there are "especially compelling" reasons for allowing the trial judge to exercise broad discretion in determining whether a mistrial is warranted based upon jury deadlock:

> On the one hand, if [the trial judge] discharges the jury when further

> deliberations may produce a fair verdict, the defendant is deprived of his 'valued right to have his trial completed by a particular tribunal.' But if [the trial judge] fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the 'necessity' for a mistrial differently than the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

Id. at 509-10. The Supreme Court also has made clear that a trial court's failure to examine alternatives to declaring a mistrial or to make an explicit finding of manifest necessity alone does not negate the propriety of a mistrial provided that such a determination is supported by the record. *Id.* at 516-17; *see also Gantley*, 172 F.3d at 429-30.

But in recognizing the great deference to be accorded a trial court's mistrial decision, the Supreme Court did not endorse a rubber-stamp approach. Rather, the Court instructed:

> Our conclusion that a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference does not, of course, end the inquiry. As noted earlier, a constitutionally protected interest is inevitably affected by any mistrial decision. The trial judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn*, 400 U.S.{470], at 486 [(Harlan, J.). *In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial.*
>
> Thus, if a trial judge acts irrationally or irresponsibly . . . his action cannot be condoned.

Arizona, 434 U.S. at 514 (emphasis added) (citations omitted). The Court in *Arizona v. Washington* was satisfied that the state trial judge properly exercised his discretion in that case because the record revealed that the lower court conducted a hearing on whether defense counsel's conduct required a mistrial, the state judge expressed and acknowledged concern over the double jeopardy consequences of his action, both sides were given an opportunity to explain their positions, and the judge considered the matter over two days. The record in the present case demonstrates none of these things.

When the trial judge has made no findings, provided no reasoning, articulated no justification, and entertained no argument from counsel, as in this case, a reviewing court must look to other objective clues in the record to determine whether the trial court exercised discretion in declaring a mistrial and to assess the soundness of the choice. In reversing the denial of a habeas writ sought on double jeopardy grounds, the Sixth Circuit held that several factors are to be considered when assessing whether "sound discretion" has been exercised, although no rigid test can be applied:

> In determining whether sound discretion has been exercised, several factors must be considered. These factors include: (1) a timely objection by the defendant; (2) the jury collective opinion that it cannot agree on a verdict; (3) the length of the jury deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury (6) any proper communication which the judge has with the jury; (7) the effects of possible exhaustion and the impact which coercion of further deliberations might have on the verdict; and (8) the trial judge's belief that additional prosecutions will result in continued hung juries.

Jones v. Hogg, 732 F.2d 53, 56 (6th Cir. 1984).

The Michigan Supreme Court considered some of these factors when it observed that (1) the ju deliberated at least four hours following a "relatively short" and "far from complex" trial; (2) the jury sent out several notes, including one in which the jury expressed "concern about our voice levels disturbing any other proceedings that might be going on," *Lett*,

466 Mich. at 209 n.2, 644 N.W.2d at 745 n.2; (3) neither party objected; and (4) the jury foreperson responded in the negative to the judge's question whether they were going to reach a unanimous verdict. *Id.* at 223, 644 N.W.2d at 753. These bases for concluding that the trial judge exercised "sound discretion" in declaring that a mistrial was necessary are not particularly compelling.

Although the actual time that the jurors were in the courtroom may have been relatively short, the proceedings spanned ten days. According to the transcript of proceedings, the time for trial (approximately fifteen hours) was about twice what the state supreme court estimated. In addition, it does not appear that the state supreme court accounted for the difficulty that can result from having to assemble information given to the jury in the piecemeal fashion that it was in this case. Altogether, seventeen witnesses testified at the first trial either in person or through the transcript of former proceedings. It is remarkable that a jury could review the testimony of all those witnesses in the time they were given, let alone conclude that they were deadlocked. Since the record does not reveal the time when the jurors commenced deliberations on June 13, it cannot be known with certainty how long they deliberated that day. However, the length of their deliberations does not lend support to the conclusion that a mistrial due to jury deadlock was manifestly necessary.

This conclusion is supported by comparison of this mailer to other eases in which mistrials were declared after a relatively short period of deliberations. For instance in *Shaw v. Norris,* 33 F.3d 958, 962 (8th Cir. 1994), the court of appeals referred to the trial judge's "unique vantage point" in affirming the declaration of a mistrial based upon jury deadlock after three and one-half hours of deliberations. But in

that ease, the jury sent a note that it was deadlocked six-six, the court then gave additional instructions regarding deadlock and encouraged them to re-examine their positions, the jury reached a partial verdict on one of the counts and declared an impasse on the other two counts, and one juror had taken ill. In *Lyons v. Jackson*, 820 F.2d 1225, 1987 WL 36108, *3 (6th Cir. 1987)(Table), the court of appeals held that declaration of a mistrial was not an abuse of discretion, explaining that "there is no doubt that an experienced trial judge has the best vantage point to determine whether further jury deliberations would be appropriate." The circumstances in that case, however, were that the trial proofs lasted three days, the jury retired to deliberate on a Thursday afternoon, it deliberated all day Friday, late in the day the court gave a modified *Allen* charge, the jury recessed over the weekend and deliberated Monday morning, the jury expressly stated in a note they could not reach agreement on either count, the court sought input from counsel, and then declared mistrial.

The state supreme court inferred from the jurors' note expressing concern over their voice levels that the deliberations were acrimonious. However, there is no other suggestion in the record that such was the case, and the trial judge did not draw that conclusion. Jurors often disagree, and sometimes express that disagreement with enthusiasm, but there is nothing in this record that lends support to the conclusion that the jury was overwhelmed with disharmony or that it would not be able to reach a unanimous verdict given sufficient time.

The state court also pointed to the absence of objection to the mistrial from defense counsel. Certainly, lack of objection is a factor to consider if it can lead to the conclusion of acquiescence in the trial judge's actions. However, as acknowledged by the state

supreme court, there is no evidence in this record that the trial judge ever advised counsel as to the substance of the jury's note or engaged counsel in any discussion. To the contrary, it appears that the trial judge acted precipitously, and her announcement of a mistrial was the first notice defense counsel had of the court's intended action. An objection after the fact perhaps would have completed the record, but it is unlikely that it would have changed the result. In the absence of any discussion by counsel on the record of any nature concerning the termination of the first trial, the lack of objection does little to fortify the conclusion that a mistrial was necessary.

The most weighty factor considered by the state supreme court was the jury forewoman's response to the trial judge's question whether the jury was "going to reach a unanimous verdict[] or not?. . . Yes or no?" Trial Tr. at 320 (June 13, 1997). The state supreme court characterized the response as an unequivocal statement that the jury could not reach a unanimous verdict. However, that is not an accurate description of what occurred.

The on-the-record exchange between the trial judge and the jury forewoman was precipitated by a note, but that note did not report that the jury was deadlocked. The jury merely asked the judge what the consequences would be if they could not agree on a verdict. Therefore, the note itself cannot be considered any real evidence of a deadlock.

More importantly, once in the courtroom, the foreperson did not "expressly state that the jury was not going to reach a verdict," *Lett*, 466 Mich. at 223, 644 N.W.2d at 753, as the state supreme court described the exchange. When first asked whether the jury was "hopelessly deadlocked," the foreperson responded by stating that "[t]he majority of us don't

believe that —," at which point the trial judge interrupted. Trial Tr. at 320 (June 13, 1997). This Court does not fault the trial judge for cutting off the foreperson so as to preserve the secrecy of jury deliberations. However, this truncated exchange tends to show that the foreperson did not feel prepared to declare definitively that the jury was hopelessly deadlocked. Yet a definitive answer is exactly what the trial judge demanded, and the record demonstrates that the foreperson was corralled, in a matter of seconds, into taking a stance one way or the other. Immediately after interrupting the foreperson, the trial judge asked, "Are you going to reach a unanimous verdict, or not?" *Ibid.* The foreperson apparently felt unconfident in answering this question, as a pause appears on the record. The pause was understandable. Although very direct, the trial judge's query was actually rather ambiguous; it did not, for instance, specify the time-line for reaching a unanimous verdict. The foreperson could have easily thought the judge meant, "Are you going to reach a unanimous verdict *in the next hour*?" or "*before the lunch recess*?" or "*by the end of the day*?" This is particularly plausible in light of the judge's apparent and — based on the absence of any justification in the record, irrational — rush to resolve the issue. Rather than clarify what she intended, however, the judge pressed on. "Yes or no?," she asked. Trial Tr. at 320 (June 13, 1997). The foreperson answered, "No, Judge." *Ibid.* Although that response may sound definitive in isolation, viewed in context it is not. A fair reading of the record does not permit the conclusion that the jury unequivocally informed the trial judge that it would not reach a unanimous verdict within a reasonable time.

The decision to declare a mistrial in this case unreasonably terminated the proceedings and trenched upon the petitioner's right to "conclude his confrontation with society through the verdict of a

tribunal he might believe to be favorably disposed to his fate." *United States v. Jorn,* 400 U.S.470, 486 (1971) (Harlan, J.). There are no statements in the record by the trial judge that give reasonable clues as to the reasons for her hasty decision to end jury deliberations, and the objective evidence in the record does not demonstrate jury deadlock. The Court cannot conclude that a mistrial was a "manifest necessity" or that the state trial judge exercised "sound discretion" in declaring a mistrial. Although the trial judge's decision is entitled to great deference, it is not the place of a reviewing court to extract factoids from the record in an attempt to salvage a bad decision.

The Supreme Court has obligated reviewing courts to ensure that a "trial judge exercised 'sound discretion' in declaring a mistrial." *Arizona*, 434 U.S. at 514. In finding that the trial judge's declaration of a mistrial in this case was a proper exercise of that discretion, the state supreme court unreasonably applied federal law as stated in *Arizona v. Washington*. The mistrial was not manifestly necessary in this case. Therefore, the defendant's second trial and ensuing conviction violated the petitioner's rights under the Double Jeopardy Clause.

III

For the reasons stated, the Court concludes that the decision of the Michigan Supreme Court is an unreasonable application of federal law as determined by the United States Supreme Court.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **GRANTED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 31, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REGINALD LETT,

Petitioner,

v.

Civil No. 04-10018
Honorable David M. Lawson

PAUL RENICO,

Respondent.
_____/

JUDGMENT

In accordance with the Opinion and Order entered on this date,

It is **ORDERED AND ADJUDGED** that the Petition for Writ of Habeas Corpus be, and the same hereby is, **GRANTED**.

It is further **ORDERED** that the respondent shall release the petitioner from custody forthwith.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 31, 2007

LEXSEE 466 MICH 206

PEOPLE OF THE STATE OF MICifiGAN, Plaintiff-Appellant, v REGINALD JOHN LETT, Defendant-Appellee.

No. 117041

SUPREME COURT OF MICHIGAN

466 Mich. 206; 644 N.W.2d 743; 2002 Mich. LEXIS 1038

October 10, 2001, Argued

June 4, 2002, Decided

June 4, 2002, Filed

PRIOR HISTORY: [***1] Wayne Circuit Court, Thomas W. Brookover, J. Detroit Recorder's Court, Helen E. Brown, J. Court of Appeals, JANSEN, P.J., and COLLINS and J. B. SULLIVAN, JJ., (Docket No. 209513). People v. Left, 2000 Mich. App. LEXIS 1841 (Mich. Ct. App., Apr. 21, 2000)

DISPOSITION: Reversed and remanded.

COUNSEL: Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, Michael E. Duggan, Prosecuting Attorney, Timothy A. Baughman, Chief, Research, Training and Appeals, and Janet A. Napp, Assistant Prosecuting Attorney, Detroit, MI, for the people.

State Appellate Defender (by Gail Rodwan), Detroit, MI, for the defendant-appellee.

Amicus Curiae: Jeff Sauter, PAAM President, and Jerrold Schrotenboer, Chief Appellate Attorney,

Jackson, MI, in support of the people.

JUDGES: BEFORE THE ENTIRE BENCH. Chief Justice Maura D. Corrigan, Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Clifford W. Taylor, Robert P. Young, Jr., Stephen J. Markman. CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG,J., CAVANAGH, J. (dissenting). KELLY, J., con curred with CAVANAGH, J.

OPINION BY: Robert P. Young, Jr.

OPINION

[**744] [*208] YOUNG J.

We granted leave to appeal in this case to consider whether defendant is entitled to the reversal of his convictions on the ground that he was retried, [***2] following the declaration of a mistrial, in violation of his constitutional right to be free from double jeopardy. We conclude that the trial court did not abuse its discretion in declaring a mistrial and in dismissing the jury where the jury foreperson indicated that the jury members were not going to reach a unanimous verdict and defendant did not object to the declaration of mistrial. We additionally conclude that defendant's retrial, following the proper declaration of a mistrial, [**745] did not violate the constitutional protection against successive prosecutions. Accordingly, we reverse the decision of the Court of Appeals and remand this matter to that Court for consideration of the additional issue that was raised by defendant, but not decided.

I. FACTUAL AND PROCEDURAL BACK GROUND

On August 29, 1996, Adesoji Latona, a taxi driver, was fatally shot at a Detroit liquor store. Latona was apparently confronted by a group of

men, including defendant, as he entered the liquor store. One of the men, Charles Jones, accused Latona of throwing him out of Latona's cab, and an argument ensued inside the store. Latona's girlfriend testified that she saw defendant draw a gun, after which [***3] she heard two gunshots. In a statement given to police following the [*209] incident, defendant admitted that he was at the party store at the time of the shooting and that he and Jones had fought with Latona inside the store. Defendant further stated that he had retrieved a gun from another friend in the parking lot, and that he went back inside and fired the gun into the air before running back outside. Latona died from two gunshot wounds, one to the head and one to the chest.

Defendant was charged with first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's first trial, which took place in June 1997 before Detroit Recorder's Court Judge Helen E. Brown, consumed from jury selection to closing statements and jury instructions a total of eight and one-half hours spread out over six days. After approximately four or five hours of deliberation, [1] the jury sent Judge Brown a note which stated: "What if we can't agree? Mistrial? Retrial? What?" [2] Upon receiving the note, Judge Brown called the jury into the courtroom and, with the assistant prosecuting attorney [***4] and defense counsel present, engaged [3] in the following exchange with the jury foreperson:

[*210] *The Court:* I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves [sic] please?

Foreperson: [Identified herself.]

The Court: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?

Foreperson: Yes, there is.

The Court: All right. Do you believe that it is hopelessly dead locked?

Foreperson: The majority of us don't believe that.

The Court: (Interposing) Don't say what you're going to say, okay?

Foreperson: Oh, I'm sorry.

The Court: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

[**746] *Foreperson*: (No response)

The Court: Yes or no?

Foreperson: No, Judge.

The Court: All right. I hereby declare a mistrial. The jury is dismissed.

1 The jury deliberated from approximately 3:24 p.m. to 4:00 p.m. on June 12, 1997, and ended its deliberations at 12:45 p.m. on June 13, 1997. [***5]

2 During its deliberations, the jury sent out seven notes. Most of the notes were routine requests for evidence, instructions, and breaks. However, one note, sent out early on the second day of deliberations, stated that the jurors had "a concern about our voice levels disturbing any other proceedings that might be going on," indicating that perhaps the deliberations had already become

some what acrimonious.

3 We are unable to discern from the trial transcript whether any off-the-record discussion took place between Judge Brown and counsel before the jury was called into the courtroom concerning any proposed response to the jury's note.

In November 1997, defendant was retried before a different judge on charges of first-degree murder and felony-firearm. The second jury returned a verdict of guilty of the lesser offense of second-degree murder, MCL 750.317, and guilty as charged of felony-firearm. [4]

4 The second jury deliberated for approximately three hours and fifteen minutes before delivering its verdict.

[***6] In his appeal before the Court of Appeals, defendant, through appellate counsel, raised for the first time the claim that he was retried in violation of the Double Jeopardy Clause of the federal and state constitutions. Defendant argued that Judge Brown had [*211] sua sponte terminated the first trial without manifest necessity to do so and without his consent, and that retrial therefore violated his constitutional right to be free from successive prosecutions.

The Court of Appeals panel agreed and reversed defendant's convictions. The panel opined that defendant had not consented to the declaration of the mistrial, citing *People v Johnson,* 396 Mich. 424, 432; 240 N.W.2d 729 (1976), repudiated on other grounds in *People v New,* 427 Mich. 482; 398 N.W.2d 358 (1986), for the proposition that a defendant's mere silence or failure to object to the jury's discharge is not "consent." The panel, turning to defendant's claim that the decla-

ration of a mistrial was not manifestly necessary, concluded that the trial court's decision to discharge the jury was not reasonable because it had failed to consider alternatives or to make findings [***7] on the record:

Recognizing that the doctrine of double jeopardy does not preclude retrial after the discharge of a jury because of inability to agree, our Supreme Court has stated that the inquiry "turns upon [the] determination whether the trial judge was entitled to conclude that the jury in fact was unable to [agree]" *People v Duncan,* 373 Mich. 650, 660-661; 130 N.W.2d 385 (1964). This has led to the accepted rule that a trial court must consider reasonable alternatives before sua sponte declaring a mistrial and the court should make explicit findings, after a hearing on the record, that no reasonable alternative exists. *People v Hicks,* 447 Mich. 819, 841, (GRIFFIN, J.), 847 (CAVANAGH, C.J.); 528 N.W.2d 136 (1994); *People v Benton,* 402 Mich. 47, 61; 260 N.W.2d 77 (1977) (LEVIN, J.); *People v Rutherford,* 208 Mich. App. 198, 202; 526 N.W.2d 620 (1994); *People v Little,* 180 Mich. App. 19, 23-24; 446 N.W.2d 566 (1989); *People v Dry Land Marina,* 175 Mich. App. 322, 327; 437 N.W.2d 391 (1989). [***8]

In the present case, we must determine whether the trial court reasonably concluded that the jury was deadlocked. [*212] Based on the record before us, we are forced to conclude that the court did not reasonably declare a mistrial. The trial court declared a mistrial without a hearing or discussion of any alternatives. No deadlock jury instructions were given much less even considered by the trial court. See CJI2d 3.12. The jury had deliberated only four or five hours in a capital murder case

following four days of trial testimony. There was clearly a reasonable alternative in this case, that is, to give the jury a deadlock jury instruction and send it back for further deliberation. See, e.g., Hicks, [*747] 447 Mich. at pp 843-844; Benton, 402 Mich. at pp 61-62; Rutherford, 208 Mich. App. at p 203; Little, 180 Mich. App. at pp 27-30.

Because a reasonable alternative existed in this case, an alternative never given consideration by the trial court, the trial court did not engage in a scrupulous exercise of discretion in sua sponte declaring a mistrial. Hicks, 447 Mich. at p 829, citing *United States v Jorn,* 400 U.S. 470, 485; 27 L. Ed. 2d 543; 91 5. Ct. 547 (1971). [***9] Put another way, it was not manifestly necessary for the trial court to have declared a mistrial given the shortness of the jury's deliberation and the court's failure to give a deadlock jury instruction. In fact, the trial court never even found on the record that the jury was genuinely deadlocked. Given these circumstances, we are compelled to conclude that retrial violated defendant's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. Therefore, defendant's convictions are reversed. [Slip op, pp 4-5.]

We granted the prosecution's application for leave to appeal. [5] Because we conclude that manifest necessity existed to support the mistrial declaration, we reverse.

5 463 Mich. 939, 620 N.W.2d 855 (2000).

II. STANDARD OF REVIEW

A constitutional double jeopardy challenge presents a question of law that we review de novo. *People v* [*213] *Herron,* 464 Mich. 593, 599; 628 N.W.2d 528 (2001). Necessarily inter-

twined with the constitutional [***10] issue in this case is the threshold issue whether the trial court properly declared a mistrial. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is accorded great deference by a reviewing court. *Arizona v Washington*, 434 U.S. 497, 510; 98 S. Ct. 824; 54 L. Ed. 2d 717 (1978) [6] "*At most*, the inquiry . . . turns upon determination whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict." *Duncan, supra*, 373 Mich. 661 (emphasis supplied).

6 See *Huss v Graves*, 252 F.3d 952, 956-957 (CA 8, 2001) (a case involving the sua sponte declaration of a mistrial in a bench trial, contrary to both the prosecution's and the defendant's motions for entry of verdict of not guilty by reason of insanity, was "not similar to those [cases] in which a mistrial is declared when a jury is unable to reach a verdict, a situation in which a finding of manifest necessity is *almost always justified*") (emphasis supplied).

[***11] III. ANALYSIS

A. DOUBLE JEOPARDY IMPLICATIONS OF RETRIAL FOLLOWING MISTRIA

Under both the Double Jeopardy Clause of the Michigan Constitution [7] and its federal counterpart, [8] an accused may not be "twice put in jeopardy" for the same offense. The Double Jeopardy Clause originated from the common law notion that a person who has been convicted, acquitted, or pardoned should not be [*214] retried for the same offense. See *United States v Scott*, 437 U.S. 82, 87; 57 L. Ed. 2d [**748] 65; 98 S. Ct. 2187 (t978); *Crist v Bretz*, 437 U.S. 28, 33; 57 L. Ed. 2d 24; 98 S. Ct. 2156 (1978). The constitutional pro-

hibition against multiple prosecutions arises from the concern that the prosecution should not be permitted repeated opportunities to obtain a conviction:

> The underlying idea, one that is deeply in grained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing [***12] state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Green v United States,* 355 U.S. 184, 187-188; 2 L. Ed. 2d 199; 78 S. Ct. 221; 77 Ohio Law Abs. 202 (1957).

7 Const 1963, art 1, § 15. Our constitution provides no greater protection than does the federal constitution with respect to retrial following a mistrial caused by jury deadlock. *People v Thompson,* 424 Mich. 118, 125-129; 379 N.W.2d 49 (1985).

8 U.S. Const, Am V, made applicable to the states through the Fourteenth Amendment. *Benton v Maryland,* 395 U.S. 784; 23 L. Ed. 2d 707; 89 S. Ct. 2056 (1969).

From this fundamental idea, the United States Supreme Court has over the years developed a body of double jeopardy jurisprudence that recognizes, among other related rights, [9] an accused's "valued right to have his trial completed by a particular tribunal . . ." *Wade v Hunter,* 336 U.S. 684, 689; 93 L. Ed. 974; 69 S. Ct. 834 [***13] (1949); see also *[O><O] Washington, supra,* 434 U.S. 503; *Illinois v Somerville,* 410 U.S. 458, 466; 35 L. Ed. 2d 425; 93 [*215] S. Ct. 1066 (1973). Jeopardy is said to

"attach" when a jury is selected and sworn, see *Somerville, supra,* 410 U.S. 467; *Hicks, supra,* 447 Mich. 827, n 13 (GRIFFIN, J.), and the Double Jeopardy Clause therefore protects an accused's interest in avoiding multiple prosecutions even where no determination of guilt or innocence has been made. See *Scott, supra,* 437 U.S. 87-92; *Grist, supra,* 437 U.S. 33-34. It is this interest that is implicated when the trial judge declares a mistrial, thereby put ting an end to the proceedings before a verdict is reached. *Scott, supra,* 437 U.S. 92; *Grist, supra,* 437 U.S. 33-34. However, the general rule permitting the prosecution only one opportunity to obtain a conviction "must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.'" *Washington, supra,* 434 U.S. 505, n 11, quoting *Wade, supra,* 336 U.S. 689 [***14]

9 The Double Jeopardy Clause has often been described, in simple terms, as embodying three separate guarantees: protection against a second prosecution for the same offense following acquittal, protection against a second prosecution for the same offense following conviction, and protection against multiple punishments for the same offense. See *Ohio v Johnson,* 467 U.S. 493, 497; 81 L. Ed. 2d 425; 104 S. Ct. 2536 (1984); *Justices of Boston Municipal Court v Lydon,* 466 U.S. 294, 306-307; 80 L. Ed. 2d 311; 104 S. Ct. 1805 (1984); *Herron, supra,* 464 Mich. 599; *People v Vincent,* 455 Mich. 110, 120, n 5; 565 N.W.2d 629 (1997). However, as the Court noted in *Grist, supra,* 437 U.S. 32, the "deceptively plain language" of the Double Jeopardy Clause "has given rise

> to problems both subtle and complex. . .

"It is axiomatic that retrial is not automatically barred [***15] whenever circumstances compel the discharge of a factfinder before a verdict has been rendered." *Hicks, supra*, 447 Mich. 827 (GRIFFIN, J.). It is well settled, for instance, that where a defendant requests or consents to a mistrial, retrial is not barred unless the prosecutor has engaged in conduct intended to provoke or "goad" the mistrial request. See *Oregon v Kennedy*, 456 U.S. 667, 675-676; 72 L. Ed. 2d 416; 102 S. Ct. 2083 (1982); *United States v Dinitz*, 424 U.S. 600, 608; 47 L. Ed. 2d 267; 96 S. Ct. 1075 (1976); *Hicks, supra*, 447 Mich. 828 (GRIFFIN, J.). Additionally, retrial is always permitted [**749] when the mistrial is occasioned by "manifest necessity." *Kennedy, supra*, 456 U.S. 672; *Washington, supra*, 434 U.S. 505; *Hicks, supra*, 447 Mich. 828 (GRIFFiN, J.).

[*216] The concept of "manifest necessity" was introduced in *United States v Perez*, 22 U.S. (9 Wheat) 579; 6 L. Ed. 165 (1824), in which the Court addressed the propriety of the retrial of an accused following the discharge of a deadlocked jury without the accused's consent. [***16] Noting that in such a case the accused has not been convicted or acquitted, the Court held that the declaration of a mistrial under these circumstances poses no bar to a future trial. 22 U.S. at 580. However, the Court indicated that trial courts are to exercise caution in discharging the jury before a verdict is reached:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, *whenever in their opinion, taking all the circumstances into con-*

sideration, . there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject;* and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the [***17] faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American Courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption [*217] to the prisoner from being again put upon trial. [*Id.* (emphasis supplied).] [10]

10 Interestingly, in *Grist, supra*, 437 U.S. 34, n 10, the Court questioned whether the Perez Court was actually deciding a constitutional question, or was rather "simply settling a problem arising in the administration of federal criminal justice." See also 437 U.S. at 44-45 (Powell, J., dissenting) ("as both Justices Washington and Story believed that the Double Jeopardy Clause embraced only actual acquittal and conviction, they must have viewed *Perez* as involving the independent rule barring needless discharges of

the jury"). However, the majority, declining to upset 150 years of settled Fifth Amendment jurisprudence, stated that "to cast such a new light on *Perez* at this late date would be of academic interest only." 437 U.S. at 34, n 10.

[***18] As noted in *Richardson v United States,* 468 U.S. 317, 323-324; 82 L. Ed. 2d 242; 104 S. Ct. 3081 (1984), "it has been established for 160 years, since the opinion of Justice Story in [*Perez*] that a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to ter minate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated." See also *Washington, supra,* 434 U.S. 509 ("the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has been] long considered the classic basis for a proper mistrial"); *Kennedy, supra,* 456 U.S. 672 ("the hung jury remains the prototypical example" of a situation meeting the "manifest necessity" standard); *People v Thompson,* 424 Mich. 118, 128; 379 N.W.2d 49 (1985) ("we have consistently held that retrial after a mistrial [**750] caused by jury deadlock does not violate the Michigan Constitution or the United States Constitution"); *Duncan, supra,* 373 Mich. 660, quoting *People v Parker,* 145 Mich. 488, 499; 108 N.W. 999 [***19] (1906) (Michigan case law has with out exception recognized that "the doctrine of former jeopardy does not preclude [*218] retrial after discharge of a jury 'for inability to agree, or for some other overruling necessity").

Defendant nevertheless contends, and the Court of Appeals agreed, that his retrial constituted a violation of his constitutional right to be free from successive prosecutions because the

trial court precipitously declared a mistrial without manifest necessity to do so. We disagree and hold that the Double Jeopardy Clause did not bar defendant's second trial or convictions.

B. MANIFEST NECESSITY

The Court of Appeals concluded that the trial court abused its discretion in discharging the jury without first examining alternatives, such as providing a "hung jury" instruction, and without conducting a hearing or making findings on the record. We hold that, because the record provides sufficient justification for the mistrial declaration, the trial court did not abuse its discretion in dismissing the jury.

The constitutional concept of manifest necessity does not require that a mistrial be "necessary" in the strictest sense of the word. Rather, [***20] what is required is a "high degree" of necessity. *Washington*, 434 U.S. 497 at 506-507, 54 L. Ed. 2d 717, 98 S. Ct. 824. Furthermore, differing levels of appellate scrutiny are applied to the trial court's decision to declare a mistrial, depending on the nature of the circumstances leading to the mistrial declaration. At one end of the spectrum is a mistrial declared on the basis of the unavailability of crucial prosecution evidence, or when the prosecution is using its resources to achieve an impermissible tactical advantage over the accused. The trial judge's declaration of a mistrial [*219] under those types of circumstances will be strictly scrutinized. 434 U.S. at 508. At the other end of the spectrum is the mistrial premised on jury deadlock, "long considered the classic basis for a proper mistrial." 434 U.S. at 509. [11] [**751] The trial judge's decision to discharge a jury [**220] when he concludes that it is

deadlocked is entitled to great deference. 434 U.S. at 510.

11 See also Duncan, supra, 373 Mich. 660:

> Defendant contends on appeal that discharge of the jury . . . bars his retrial because he has previously been put in jeopardy of conviction of such charges. In none of the cases [defendant has] cited is it even suggested that discharge of a jury, without the defendant's consent, for its inability to agree upon a verdict thereby bars subsequent retrial.
>
> When a mistrial is declared on the basis of juror deadlock, double jeopardy interests will rarely, if ever, be implicated, because jeopardy "continues" following the mistrial declaration. *See Richardson, supra,* 468 U.S. 325-326, reaffirming that "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy" to which the defendant was subjected. See also *People v Mehall,* 454 Mich. 1, 4-5; 557 N.W.2d 110 (1997):
>
> One circumstance that constitutes a manifest necessity is the jury's failure to reach a unanimous verdict. When this occurs, and the trial court declares a mistrial, a retrial is not precluded *because the original jeopardy has not been terminated,* i.e., there has not been an assessment of the sufficiency of the prosecution's proofs. [Emphasis supplied.]
>
> We were recently guided by this principle in *Herron,* 464 Mich. 593, in which we determined that the defendant could be tried in a second trial for second degree murder after the first jury arrived

at a verdict with respect to one charge, but was unable to reach a verdict with respect to the murder charge:

> Where criminal proceedings against an accused have not run their full course, the Double Jeopardy Clause does not bar a second trial. . . . Thus, because the prosecutor's retrial of defendant on the charge of second-degree murder was the result of a hung jury, we conclude that there was no violation of double jeopardy principles aimed at multiple prosecutions. [464 Mich. at 602-603 (citations omitted).]

See also, e.g., *United States v Streett,* 2001 U.S. App. LEXIS 22556, 2001 WL 420367 (WD VA, 2001) (defendants' argument that retrial after a mistrial declared because of jury deadlock was constitutionally impermissible is without merit, both because of the "broad discretion" enjoyed by the trial court in making this determination and because "the Supreme Court has expressly held that the failure of a jury to reach a verdict is 'not an event which terminates jeopardy").

[***21] As the United States Supreme Court has opined:

> There are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there

exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference [***22] by a reviewing court. [*Id.* at 509-510.]

Therefore, the mere fact that the reviewing court would not have declared a mistrial under the circumstances of this case does not mean that retrial is necessarily barred. The issue is not whether this Court would have found manifest necessity, but whether the trial court abused its discretion in finding manifest necessity. [12]

12 As noted, a trial court's decision to declare a mistrial on the basis of juror deadlock is entitled to a high degree of deference. It is well established that "an abuse of discretion involves far more than a difference in judicial opinion." *Alken-Ziegle Inc v Waterbury Headers Corp*, 461 Mich. 219, 227; 600 N.W.2d 638 (1999); *Spalding v Spalding*, 355 Mich. 382, 384; 94 N.W.2d 810 (1959). Rather, "such abuse occurs only when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof; not the exercise of reason but rather of passion or bias." *Alken-Ziegle*

supra at 227, quoting *Spalding, supra* at 384-385. We simply cannot conclude that the trial court abused its discretion in such a manner here.

[***23] [*221] Consistent with the special respect accorded to the court's declaration of a mistrial on the basis of jury deadlock, this Court has never required an examination of alternatives before a trial judge declares a mistrial on the basis of jury deadlock [13]; [**752] nor have we ever required that the judge conduct a "manifest necessity" hearing or make findings on the record. In fact, we long ago stated that, "at most, . . . the inquiry in [such a case] turns upon determination *whether the trial judge was entitled to conclude that the jury in fact was unable to reach a verdict.*" *Duncan, supra,* 373 Mich. 661 (emphasis supplied). Moreover, the United States Supreme Court has expressly indicated [*222] that the failure of a trial judge to examine alternatives or to make findings on the record before declaring a mistrial does not render the mistrial declaration improper. Instead, where the basis for a mistrial order is adequately disclosed by the record, the ruling will be upheld. *Washington, supra,* 434 U.S. 515-517. [14]

13 We acknowledge that we have required the examination of alternatives in other mistrial contexts. See *Hicks, supra,* 447 Mich. 843-845 (GRIFFIN, J.) (declaration of a mistrial after the trial judge recused herself over the defendant's objection); *Benton, supra,* 402 Mich. 47 (sua sponte declaration of a mistrial on the basis of prosecutorial error). We need not determine whether the failure to consider alternatives to mistrial in circumstances other than jury deadlock is constitutionally impermiss-

ible. We note, however, that in support of the proposition that consideration of alternative measures is constitutionally required in these other contexts, this Court in *Benton* cited two federal circuit court opinions that were subsequently overturned by the United States Supreme Court: *Arizona v Washington,* 546 F.2d 829, 832 (CA 9, 1976), was reversed on appeal to the Supreme Court at 434 U.S. 497 (in which the Court rejected the notion that the trial judge was required to consider or utilize alternatives before declaring a mistrial), and *United States v Grasso,* 552 F.2d 46, 49-50 (CA 2, 1977), vacated by the Supreme Court at 438 U.S. 901; 98 S. Ct. 3117; 57 L. Ed. 2d 1144 (1978) (directing the Court of Appeals to reconsider in light of *Washington,* 546 F.2d 829). See *Benton, supra,* 402 Mich. 57, n 11, 61, n 19.

[***24]

14 Justice Marshall, joined by Justice Brennan, dissented: "What the 'manifest necessity' doctrine . . . requires, in my view, is that the record make clear either that there were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings." *Id.* at 525 (Marshall, J.). The Court of Appeals panel's view in the instant case, although apparently consistent with the view of Justices Marshall and Brennan, was specifically rejected by the *Washington* majority.

Although we acknowledge that the "deadlocked jury" instruction, CJI2d 3.12, might have appropriately been given to the jury in this case, the fact remains that

defendant did not request that this instruction be given. [15] We are not aware of any requirement that a trial court sua sponte instruct a deadlocked jury to resume deliberations. Moreover, we remain cognizant of the significant risk of coercion that would necessarily accompany a requirement that a deadlocked jury [*223] be forced to engage in protracted deliberations. [***25] See *Washington, supra*, 434 U.S. 509-5 10; *People v Hardin*, 421 Mich. 296; 365 N.W.2d 101 (1984). [16]

15 Further, it appears from the record that defendant did not object to the trial court's decision to discharge the jury. The prosecution contends that under these circumstances defendant "implicitly consented" to the declaration of mistrial, thus rendering it unnecessary to determine whether the declaration was supported by manifest necessity. See *Hicks, supra*, 447 Mich. 858, n 3 (BOYLE, J., dissenting) ("the Supreme Court appears to use 'consent' . . . to refer to mistrials not requested by the defendant, but only acquiesced to") (emphasis supplied); see also *United States v Aguilar-Aranceta*, 957 F.2d 18, 22 (CA 1, 1992); *United States v Beckerman*, 516 F.2d 905, 909 (CA 2, 1975); *United States v Phillips*, 431 F.2d 949, 950 (CA 3, 1970); *United States v Ham*, 58 F.3d 78, 83-84 (CA 4, 1995); *United States v Palmer*, 122 F.3d 215, 218 (CA 5, 1997); *United States v Gantley*, 172 F.3d 422, 428-429 (CA 6, 1999); *Camden v Crawford Co Circuit Court*, 892 F.2d 610, 614-618 (CA 7, 1989); *United States v Gaytan*, 115 F.3d 737, 742 (CA 9, 1997); *Earnest v Dorsey*, 87 F.3d 1123, 1129 (CA 10, 1996); *United States v Puleo*, 817 F.2d 702, 705 (CA

11, 1987) . In light of our determination that the mistrial declaration was manifestly necessary, we save for another day the issue of implied consent.
[***26]

16 See also *United States v Klein*, 582 F.2d 186, 194 (CA 2, 1978):

> The appellant argues that a retrial is barred because of the failure of the trial court to make explicit findings that there were no reasonable alternatives to a mistrial . . . . *The short answer to this claim is the holding of* Arizona v Washington *that such findings are not constitutionally required.* [Emphasis supplied.]

See also Hicks, supra, 447 Mich. 867 (BOYLE, J., dissenting)("the assumption that, as a matter of law, manifest necessity requires the exploration of less drastic alternatives to mistrial . . . ignores that the United States Supreme Court has specifically rejected [this] proposition").

[**753] We conclude that the judge did not abuse her discretion in declaring a mistrial under the circumstances of this case. The jury had deliberated for at least four hours following a relatively short, and far from complex, trial. The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly [***27] heated. Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict. [17] We conclude that, in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. Accordingly, manifest necessity for the jury's discharge existed,

and defendant's retrial did not constitute a constitutionally impermissible successive prosecution.

> 17 This Court long ago indicated that "the court is justified in accepting [the jury's] statement that [it] cannot agree as proper evidence in determining the question." *People v Parker*, 145 Mich. 488; 502; 108 N.W. 999 (1906). See also *United States v Cawley*, 630 F.2d 1345, 1349 (CA 9, 1980) ("the most critical factor is the jury's own statement that it is unable to reach a verdict").

[*224] C. RESPONSE TO THE DISSENT

Our dissenting colleague opines that "the majority eviscerates established precedent requiring [***28] that trial judges exert reasonable efforts to avoid a mistrial." *Post* at 1. We disagree. In holding that double jeopardy considerations did not preclude defendant's retrial, we have merely set forth the unremarkable proposition that the failure of the jury to agree on a verdict is an instance of manifest necessity, allowing the trial court to declare a mistrial, discharge the jury, and retry the defendant.

Although the dissent ostensibly agrees that "no specific inquiry into alternatives to declaring a mistrial is required," *post* at 3, the dissent nevertheless points out that the trial court did not poll the jurors, did not give a deadlocked jury instruction, and did not ask defense counsel for his thoughts. *Post* at 4. These, of course, would have been alternatives to declaring a mistrial. However, this Court has never required the trial court to explain why it chose to declare a mistrial on the basis of jury deadlock, rather than poll the jury, give a deadlocked jury instruction, or ask defense counsel for his thoughts.

As we have explained above, the United States Supreme Court has specifically rejected such a requirement. See *Washington, supra,* 434 U.S. 516-517: [***29]

The absence of an explicit finding of "manifest necessity" appears to have been deteiminative for the District Court and may have been so for the Court of Appeals. If those courts regarded that omission as critical, they required too much. Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

[*225] Further, even the dissent in W*ashington* recognized that, where the necessity for a mistrial is "manifest on thc face of the record," the trial court does not have to make findings of necessity on the record to justify the declaration of a mistrial. 434 U.S. at 526. [**754]

In this case, the record provides sufficient justification for the trial court's declaration of a mistrial, and thus there was no need for the trial court to articulate a rationale on the record. The reasons were plain and obvious: the jury fore- person indicated that the jury was not going to be able to reach a unanimous verdict.

IV. CONCLUSION

The trial court did not abuse its discretion in declaring a mistrial, in the absence of objection by either party, where the jury expressly indicated [***30] that it was deadlocked. Accordingly, defendant's retrial did not violate the constitutional bar against successive prosecutions. We therefore reverse the decision of the Court of Appeals and remand this matter to that Court for consideration of the additional issue that was raised by defendant, but not decided. We do not retain jurisdiction.

CORRIGAN, C.J., and WEAVER, TAYLOR, and MARKMAN, JJ., concurred with YOUNG, J.

DISSENT BY: Michael F. Cavanagh

DISSENT

CAVANAGH, J. (dissenting).

I disagree with the majority's conclusion that a manifest necessity required a mistrial. In reaching its holding, the majority eviscerates established precedent requiring that trial judges exert reasonable efforts to avoid a mistrial. Bc cause I cannot agree that the prohibition [*226] against placing a defendant in double jeopardy evaporates simply because a defendant fails to object when a jury expresses discord, I respect filly dissent.

It is not apparent from the record that it was manifestly nccessary to declare a mistrial. "Because of the high value placed on defendant's not being required to undergo the discommodity of a second trial, the declaration of a mistrial should not be made lightly, even when it is made [***31] ostensibly for the protection of defendant." *People v Johnson*, 396 Mich. 424, 438; 240 N.W.2d 729 (1976). As a "general rule, . . . trial judges must consider reasonable alternatives before declaring a mistrial." *People v Hicks*, 447 Mich. 819, 841; 528 N.W.2d 136 (1994) (opinion of Griffin, J.).

In the absence of a motion by a defendant for a mistrial, "'the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings. . . ." [*People v Benton*, 402 Mich. 447, 57; 260 N.W.2d 77, 81

(1977), quoting *United States v Dinitz*, 424 U.S. 600; 96 S. Ct. 1075; 47 L. Ed. 2d 267 (1976).]

Contrary to the majority's assertions, this Court's precedent finds support in the guidance provided by the United States Supreme Court, which has affirmed that a constitutionally protected interest is inevitably affected by any mistrial decision. The trial [***32] judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." In order to ensure that [*227] this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised "sound discretion" in declaring a mistrial. [*Arizona v. Washington,* 434 U.S. 497, 514; 98 S. Ct. 824; 54 L. Ed. 2d 717 (1978) (citations omitted).] [Emphasis added.]

Thus, sound discretion requires a thoughtful, prudent analysis.

Even though no specific inquiry into alternatives to declaring a mistrial is required, [**755] such an inquiry would make clear the justification for retrial. Where no consideration of alternatives is evident, something else on the record must make clear the trial judge exercised "sound discretion" before declaring a mistrial. Unfortunately, no sound discretion was exercised here. Although this first-degree murder trial spanned a ten-day [***33] period, tried intermittently over six days, the deliberations lasted just over four hours. [1] The jury likely spent the first thirty-five minutes, late Thursday afternoon, doing little more than electing a foreperson. A few hours

into the deliberations on Friday morning, the jurors sent a note to the judge that indicated concern over their voice levels during deliberation. Some time later, the jury sent another note that asked about the consequences if they failed to agree. On that basis, the trial judge ordered the jury into the courtroom at 12:45 p.m. and asked the foreperson whether the jury could reach a verdict. The foreperson responded, "no." The trial judge then immediately declared a mistrial, and by 12:48 p.m., the jury was excused. Never did the trial judge consider alternatives or otherwise provide evidence that she exercised [*228] sound discretion. For example, the judge did not poll the jurors, give an instruction ordering further deliberations, query defense counsel about his thoughts on continued deliberations, or indicate on the record why a mistrial declaration was necessary.

1 Although it is not clear from the re cord when the jury reconvened June 13, 1997, I have assumed deliberations got under way at 9:00 a.m.

[***34] Though I acknowledge that a trial judge need not perform any explicit act to ensure a mistrial is manifestly necessary, there must be some indication on the record that such a grave act was required. *Washington* at 516-517 (the record must provide "sufficient justification" of the manifest need for a mistrial). In this case, where the jurors had been deliberating only a short time, where the note from the jurors merely questioned what might happen if they did not agree, where the judge-albeit in an attempt to properly keep the jurors' positions concealed-suppressed all comments by the foreperson that could have shed light on the need for a mistrial, and where the record as a

whole fails to reveal that "the ends of public justice' would be served by the declaration of a mistrial, I cannot agree that subjecting defendant to a new trial was manifestly necessary. *Benton* at 57.

The majority makes special note of defendant's silence, observing that defense counsel did not object to the mistrial declaration. *Ante* at 20-21, n 15. However, it was not necessary that defendant object at the very moment the mistrial had been declared, particularly because the jurors were simultaneously [***35] dismissed. Though an objection on the record would have been helpful in determining defendant's position and in refreshing the judge concerning her duty to exercise sound discretion, defense counsels failure to voice an objection cannot be considered evidence that a mistrial declaration was manifestly necessary.

[*229] The majority insinuates that defendant tried to have his cake and eat it too by failing to object to the mistrial declaration. However, defendant gained nothing as a result of his counsel's failure to timely object. [2] Either the trial judge properly [**756] declared a mistrial on the basis of manifest necessity, or she did not. If she had, retrial would have been proper. If not, defendant's right to be free from double jeopardy was violated by the second trial. If defendant had succeeded in convincing a majority of this Court that the mistrial declaration was improper, he would gain nothing other than the lawful protection of his inherent constitutional rights. That the state was able to try defendant a second time and to secure a conviction cannot make an unconstitutional second trial retrospectively valid.

2 **Defense counsel's failure to raise the double jeopardy issue**

anytime before or during the second trial was not objectively reasonable. No trial strategy could justity failing to object to the second trial. Defendant had nothing to gain by exposing himself to a second trial and, instead, lost the very thing the right was meant to protect: subjection to a trial in which the state had a second shot to get it right, i.e., to get a conviction.

[***36] The new standard articulated by the majority negates any substance the manifest necessity inquiry might have. Though the majority may feel that trial judges can declare a mistrial on the most meager record without even a cursory attempt to assure that the public interest in such a declaration outweighs the defendant's clear interest in resolution by the first factfinder, this narrow interpretation of "sound discretion" must be rejected. The majority's conclusion ignores precedent from this Court and cursorily dismisses the mandate from the Supreme Court affirming [*230] the need for trial judges to exercise sound discretion." [3]

3 The majority attempts to escape its duty to execute the Supreme Court's mandate, i.e., to assure the trial court exercised "sound discretion," by implying that I simply differ with the trial court's result. To clarify, I object not to the trial court's concern that the jurors held irreconcilable differences-in fact, I share that concern-but to its utter failure to make the pronouncement in a manner that evidences the exercise of "sound discretion." Because the judge did nothing more than act on a hunch with the most meager record for support, I cannot agree that "sound

discretion" was exercised.

[***37] In erroneously finding that manifest necessity required mistrial, the majority diminishes the constitutional rights of our citizens, specifically the right to be free from double jeopardy. Even though defense counsel failed to timely object, causing defendant to suffer unnecessarily through a second trial, such an error does not excuse a violation of constitutional magnitude. Therefore, I would affirm the decision of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

REGINALD JOHN LETT,

Defendant-Appellant.

UNPUBLISHED
April 21,2000

No. 209513
Recorder's Court
LC No. 96-008252

Before: Jansen, P.J., and Collins and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of sixteen to forty years in prison for the second-degree murder conviction and two years in prison for the felony-firearm conviction. Defendant appeals as of right and we reverse.

This case arose from the August 29, 1996, shooting death of Adesoji Latona at a party store in the city of Detroit. The victim and his girlfriend, Djuana Bradley, were going to a drive-in movie and

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

stopped at a party store on the way. The victim, a taxi driver, was driving them in his taxi. When they pulled up to the store, three people were outside the store in the parking lot. As the victim approached die store, one of the men in the parking lot confronted him and said, "You're the motherfucker that threw me out of your cab." The victim continued into the store and the man who had confronted the victim also entered the store about two to three minutes later. Bradley also entered the store, and stated that die victim and the man began to argue and the victim pushed the man. Other men had also entered the store, with one man trying to break up the fight. Bradley testified that defendant attempted to hit die victim and then pulled out a gun. Bradley ran to the back of the store and heard two gunshots.

Two other men (Frank Kelly and Darryl Walker) who were with defendant that evening at the party store testified at their preliminary examinations, which testimony was admitted at trial because they were not located for trial, that Homer Jones got into the argument with die victim. Both men stated that the victim initially pushed Jones. Kelly attempted to get Jones out of the store, and pushed the victim in the chest when he heard a gunshot. Kelly ran out of the store mid realized that his middle finger was shot off.

Defendant gave a police statement. He admitted that lie was at the party store at the time with some friends. Defendant stated that when the victim pushed his friend in the store, defendant went outside and retrieved a gun from another friend who was in a car. Defendant stated that he reentered the store with the gun, fired it once into the air, and then ran out of the store.

The medical examiner testified that the victim suffered two gunshot wounds: one to the head (left eye)

and one to the right side of the chest. Both wounds were fatal and a police officer testified that the bullets were fired from a nine millimeter g

Defendant was originally charged with first-degree murder and felony-firearm. He was tried before Judge Helen E. Brown in the Recorder's Court for the City of Detroit in June 1997. After four days of trial, the trial court instructed the jury on June 12, 1997, and the jury began its deliberations at 3:24 p.m. The jury was excused at 4:00 p.m. and resumed its deliberations the following morning. At 12:44 p.m. on June 13, 1997, the parties reconvened with counsel present and the following occurred:

> THE COURT: Let's bring the jury out.
>
> THE DEPUTY: Would you take your seats in the July box, please?
>
> (At about 12:45 p.m. - jury returned)
>
> THE COURT: You may be seated.
>
> Is the jury present and properly seated, counsel?
>
> [PROSECUTOR]: Yes, your Honor.
>
> [DEFENSE COUNSEL]: Yes, Judge.
>
> THE COURT: I received your note asking me what if you can't agree? And I have to conclude that that that is your situation at this lime. So, I'd like to ask the foreperson to identify themselves, please?
>
> [The foreperson states her name.]

THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?

THE FOREPERSON: Yes, there is.

THE COURT: All right. Do you believe that it is hopelessly deadlocked?

THE FOREPERSON: The majority of us don't believe that—

THE COURT: (Interposing) Don't say what you're going to say, okay?

THE FOREPERSON: Oh, I'm sony.

THE COURT: I don't know want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

THE FOREPERSON: (No response)

THE COURT: Yes or no?

THE FOREPERSON: No, Judge.

THE COURT: All right. Thereby declare a mistrial. The jury is dismissed.

(At about 12:48 p.m. - jury discharged)

Thereafter, defendant was retried before Judge Thomas W. Brookover on charges of first-degree murder and felony-firearm. The jury convicted

defendant of second-degree murder and felony- firearm on November 20, 1997.

Defendant first argues that he was denied his constitutional right against being placed in double jeopardy for a single offense because the trial court's initial decision to declare a mistrial was without defendant's consent and was not manifestly necessary.

Initially, we note that defendant did not raise this issue below. Therefore, the issue has been "forfeited." Under our Supreme Court's recently enunciated standard for "forfeited" constitutional error, defendant must prove that plain error occurred and that the plain error affected his substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). We believe that defendant has met this burden.

A person may not be twice placed in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In a jury trial, jeopardy attaches at the time the jury is selected and sworn. *People v Mehall,* 454 Mich 1, 4; 557 NW2d 110 (1997). If the trial is concluded prematurely, a retrial for that offense is prohibited unless the defendant consented to the interruption or a mistrial was declared because of a manifest necessity. *Id.*

First, it is without dispute that defendant did not consent to the mistrial. The trial court declared the mistrial sua sponte and there is absolutely no indication in the record that defendant consented to this action. See *People v Johnson,* 396 Mich 424, 432; 240 NW2d 729 (1976) (mere silence or the failure to object to the jury's discharge is not consent). Thus, we must consider whether the mistrial was declared because of manifest necessity.

"One circumstance that constitutes a manifest necessity is the jury failure to reach a unanimous verdict." *Mehall, supra*, p 4; accord *People v Dawson*, 431 Mich 234, 252; 427 NW2d 886 (1988) (the charged offense may be retried where the mistrial was declared because of a hung jury); *People v Thompson*, 424 Mich 118, 128; 379 NW2d 49 (1985) (retrial after a mistrial caused by jury deadlock does not violate the state or federal constitutions). Although this rule has a long and well-established history, there are limitations regarding the trial court's finding of whether the jury was actually deadlocked. Noting that it has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause," the United States Supreme Court has stated that a trial court may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. *Richardson v United States*, 468 US 317, 324; 104 5 Ct 3081; 82 L Ed 2d 242 (1984). Additionally, a reviewing court must be satisfied that the trial court exercised "sound discretion" in declaring a mistrial because of a hung jury. *Arizona v Washington*, 434 US 497, 514; 98 S Ct 824; 54 L Ed 2d 717 (1978); see also *United States v Simpson*, 94 F3d 1373, 1377 (CA 10, 1996). Similarly, our Supreme Court has stated that the double-jeopardy guarantee does not bar retrial where the trial court has reasonably concluded that the jury is unable to agree on a verdict. *People v Hall*, 396 Mich 650, 654; 242 377 (1976); accord *People v Sterling*, 154 Mich App 223, 235; 397 NW2d 182 (1986); *People v Harvey*, 121 Mich App 681, 689-690; 329 NW2d 456 (1982); *People v Riemersma*, 104 Mich App 773, 779; 306 NW2d 340 (1981).

Recognizing that the doctrine of double jeopardy does not preclude retrial after the discharge of a jury because of inability to agree, our Supreme Court has stated that the inquiry "turns upon determination

whether the trial judge was entitled to conclude that the jury in fact was unable to agree." *People v Duncan,* 373 Mich 650, 660-661; 130 NW2d 385 (1964). This has lead to the accepted rule that a trial court must consider reasonable alternatives before sun sponte declaring a mistrial mid the court should make explicit findings, after a hearing on the record, that no reasonable alternative exists. *People v Hicks,* 447 Mich 819, 841 (Griffin, J.), 847 (Cavanagh, C.J.); 528 NW2d 136 (1994); *People v Benton,* 402 Mich 47, 61; 260 NW2d 77 (1977) (Levin, J.); *People v Rutherford,* 208 Mich App 198, 202; 526 NW2d 620 (1994); *People v Little,* 180 Mieh App 19, 23-24; 446 NW2d 566 (1989); *People v Dry Land Marina,* 175 Mich App 322, 327; 437 NW2d 391 (1989).

In the present ease, we must determine whether the trial court reasonably concluded that the jury was deadlocked. Based on the record before us, we are forced to conclude that the court did not reasonably declare a mistrial. The trial court declared a mistrial without a hearing or discussion of any alternatives. No deadlock jury instructions were given much less even considered by the trial court. See CJ12d 3.12. The jury had deliberated only four or five hours in a capital murder ease following four days of trial testimony. There was clearly a reasonable alternative in this case, that is, to give the jury a deadlock jury instruction and send it back for further deliberation. See, e.g., *Hicks, supra,* pp 843-844; *Benton, supra,* pp 61-62; *Rutherford, supra,* p 203; *Little, supra,* pp 27-30.

Because a reasonable alternative existed in this case, an alternative never given consideration by the trial court, the trial court did not engage in a scrupulous exercise of discretion in sun sponte declaring the mistrial. *Hicks, supra,* p 829, citing *United States v Jorn,* 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971). Put another way, it was not manifestly

necessary for the trial court to have declared a mistrial given the shortness of the jury's deliberation and the court's failure to give a deadlock jury instruction. In fact, the trial court never even found on the record that the jury was genuinely deadlocked. Given these circumstances, we are compelled to conclude that retrial violated defendant's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. Therefore, defendant's convictions are reversed.

Because of our resolution of this issue, we need not address the other issue raised by defendant.

Reversed.

/s/ Kathleen Jansen
/s/ Jeffley G. Collins
/s/ Joseph B. Sullivan

No. 07-2174

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REGINALD LETT,	)	
	)	
Petitioner-Appellee,	)	
	)	
v.	)	ORDER
	)	
PAUL RENICO,	)	
	)	
Respondent-Appellant.	)	

BEFORE: COLE and GIBBONS, Circuit Judges; and FORESTER*, District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Forester would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT
Leonard Green
Clerk

---

*Hon. Karl S. Forester, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE
CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

v

REGINALD J. LETT

Defendant.
_____/

TRIAL BY JURY – VOLUME I (Pages 001-194)

PROCEEDINGS HAD in the above-entitled cause before the HONORABLE HELEN E. BROWN, Judge of the Recorder's Court for the City of Detroit, at Room 704, Frank Murphy Hall of Justice, Detroit, Michigan, on Monday, June 3, Thursday, June 5, and Tuesday, June 10, 1997.

APPEARANCES:

MR. WILLIAM HEAPHY, Assistant Prosecuting Attorney, On Behalf of the People

MR. JOSHUA GORDON, Attorney-at-Law On Behalf of the Defendant

Cynthia A. Gardner – CSMR 0435

Official Court Reporter

Detroit, Michigan

Tuesday, June 3, 1997 — at about 11:00 a.m.

(Court, counsel and all parties present)

THE COURT: All right. Ready?

MR.. HEAPHY: Ready, your Honor.

MR. GORDON: Yes Judge.

THE COURT: We're back on the record. Appearances, please?

MR. HEAPHY: William Heaphy, for the People, Judge, Good morning.

MR. GORDON: Your Honor, good morning. Josh Gordon, on behalf of Mr. Lett.

THE COURT: All right. We have our next jurors ready. Let's bring them in so that we can bring them up to speed with the others.

(At about 11:02 a.m. – 2nd panel of prospective jurors enter courtroom)

THE COURT: You may be seated. Good morning, ladies and gentlemen.

THE PROSPECTIVE JURORS: (Collectively) Good morning.

THE COURT: I'd like to welcome you to Recorder's Court. I'm Judge Helen Brown, and I'm presiding in this matter.

We began jury selection in this matter, yesterday, and we're continuing that, so you're joining us. And I want to bring you up to the point where we were, yesterday, so that I can bring the other people out. And we'll continue from there

(Continued jury voir dire reported by court reporter; not ordered transcribed)

THE COURT: Okay. Thank you. Any challenges for cause, counsel?

Mr. HEAPHY; I pass for cause, your Honor

MR. GORDON: Your Honor, pass for cause.

THE COURT: Okay. Peremptories, Mr. Heaphy?

MR. HEAPHY: Your Honor, I satisfied.

THE COURT: All right. Peremptories Mr. Gordon.

MR. GORDON: Satisfied.

THE COURT: Okay. We have a jury. Those of you who are still with us, here, I'm going to ask that you go back to the first floor where you may be reassigned to another courtroom for another case. But we would like to thank you, very much, for serving with us. All rise for the panel to leave, please.

MR. GORDON: Thank you-

OFFICE-IN-CHARGE: Thank you, Judge-

THE COURT: Thank you, Sergeant

(At about 11:59 a.m. – adjournment)

Detroit, Michigan

Thursday, June 5, 1997 — at about 10:15 a.m.

(Court, counsel and all parties present)

THE COURT On the record, now, in the Lett matter. The parties are present. You're ready? You've got your witness?

MR. HEAPHY: Yes, I am, Judge.

THE COURT: The witnesses are sequestered, except for the one you're calling, now? The jurors are back from their break?

DEPUTY GLAAB: Yes.

THE COURT: Okay, gootd. Let's bring them out.

MR. HEAPHY: Thanks, Judge.

(At about 10:18 a.m. — jury returned)

THE COURT: You may be seated. Good morning, ladies and gentlemen.

THE JURORS: (Collectively) Good morning .

THE COURT: Welcome back. We going to proceed, now, with the next witness. And I did receive your note about, you know, some people having some medication. And I'm going to try to give frequent breaks, but if I'm insensitive and forget then just

clerk, testified as follows:

DIRECT EXAMINATION

BY MR. HEAPHY:

Q. Your name, for the record, sir?

A. Officer John Harvan.

Q. And occupation?

A. Police officer.

Q. Were you on duty back on the night of August 29, 1996?

A. Yes, I was.

Q. And did you get – are yon familiar with a place called the Player's Party Store?

A. Yes.

Q. And it's on West Chicago, right?

A. Yes

Q. Were you called to that place on August 29, of 1996, about 10:20 p.m.?

A. We backed the other squad, the other scout car.

Q. All right. Who were the officers you backed up, do you remember?

A. That would be Sean Washington and Maya Reece.

Q. All right. What did you do at the scene when you got there?

A. Basically, we secured the scene and conveyed the complainant, along with E.M.S to the Grace Hospital.

Q. So, you followed E.M.S. to Grace Hospital?

badges visible, not to discuss the case with anyone, and not to discuss it amongst yourselves, either. We will reconvene at 2:00 and continue the trial, then. All rise for the jury.

(At about 12:09 p.m. – jury left courtroom proceedings continued out of presence of jury)

THE COURT: All right. You may be seated. We're going to reconvene. Sergeant Petersen can let the Court know, at 2 o'clock, then, if the witness has cooperated with the Court in giving information on their whereabouts

THE OFFICER-IN-CHARGE: He has been.

THE COURT: He has?

THE OFFICER-IN-CHARGE: He has, yes.

THE COURT: All right. That being the case, he may be released. I'll discharge the writ.

(At about 12:12 p.m. – recess)

(At about 2:55 p.m. – proceedings reconvened; all parties present)

THE COURT: Back on the record. All parties ere present. Let's bring the jury out. All rise.

MR. GORDON: Judge, I think we have--

MR. HEAPHY: (Interposing) Judge, we

People.

MR. GORDON: No.

THE COURT: All right. We'll see you Monday.

MR. GORDON: Bye-bye.

(At about 4:15 p.m. – adjournment)

* *

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE
CITY OF DETROIT

THE PEOPLE OF THE STATE OF MICHIGAN

v

REGINALD J. LETT

Defendant.
_____/

TRIAL BY JURY – VOLUME II (Pages 195-322)

PROCEEDINGS HAD in the above-entitled cause before the HONORABLE HELEN E. BROWN, Judge of the Recorder's Court for the City of Detroit, at Room 704, Frank Murphy Hall of Justice, Detroit, Michigan, on Wednesday, June 11, Thursday, June 12, and Friday, June 13, 1997.

APPEARANCES:

MR. WILLIAM HEAPHY, Assistant Prosecuting Attorney, On Behalf of the People

MR. JOSHUA GORDON, Attorney-at-Law
On Behalf of the Defendant

Cynthia A. Gardner – CSMR 0435
Official Court Reporter

Detroit, Michigan

Wednesday, June 11, 1997 – at about 10:44 a.m.

(Court, Counsel and all parties present)

THE COURT: All right. We're back on the record. Let's bring the jury out. All rise.

(At about 10:45 a.m. – jury returned)

THE COURT: You may be seated.

Ms Collins, who was in seat number seven, still has a daughter who is very, very sick; or, I should say her daughter is still very, very sick so I excused her.

Now, let's see. That leaves us with 12 who are going to be the deliberating jury. So, you're it.

Counsel, do you stipulate that this jury is properly seated and present?

MR. HEAPHY: I do, your Honor. Satisfied.

MR. GORDON: Yes, Judge.

THE COURT: You may call your next witness, Mr. Heaphy

MR. HEAPHY: Mr. Darryl Walker?

Sir, why don't you walk through that swinging door, step this way, and give your name to the

eyewitnesses. So I going to have us break for the day and come back in the morning. And I apologize, again for the inconvenience. We'll see you at 9:00

(At about 12:28 p.m. – jury left for the day)

(At about 12:30 p.m. – adjournment)

* *

Detroit, Michigan

Thursday, June 12, 1997 – at about 10:00 a.m.

(Court, counsel and all parties present)

MR. HEAPHY: Good morning, Judge.

MR. GORDON: Good morning, Judge.

THE COURT: All right. You've got one witness; tell me about the others.

MR. HEAPHY: Judge, I spoke with Sergeant Price of the Metro Crime Mobile Unit, this morning and they were not able to locate those witnesses. And Sergeant Price, himself, said that he would be here at 11:00 with the documentation about efforts that were made.

THE COURT: Oh, okay.

MR. HEAPHY: And it was Sergeant Price's crew that found the two witnesses that we were able to find.

THE COURT: Um hmm.

MR. HEAPHY: And so any questions the Court has about due diligence, and possibly questions I might have for Sergeant Price, for the jury, about efforts made to locate those witnesses can be asked at that time.

THE COURT: All right. Very good. That

Q. Okay. And do you know if any other officers went back on Collins Street?

A. Umm, Sergeant Davis, he also had the same information. I know he went to— to— I believe it was Homer Jones job

Q. Okay. But I'm asking about the Collins Street address. Did he ever go— do you know if Sergeant Davis went there?

A. I don't know.

Q. Okay. Now, with respect to Mr. Levon Jones, did you check the hospitals, the jails, parole lists, anything like that?

A. No.

MR. GORDON: Thank you. No further questions.

THE COURT: Be back at 2:00. Have them check hospitals, jails, morgue. See you then.

MR. HEAPHY: Thank you, Judge.

See what you can do.

THE WITNESS: All right.

(At about 12:31 p.m. – recess)

(At about 2:19 p.m. – proceedings reconvened; all parties present)

THE COURT: All right. Let's go back on the record with the Lett case. Sergeant Price, I see

we've got 12, so we don't have any of the others.

Now, have I omitted any jury instructions, counsel?

MR HEAPHY: No, your Honor.

MR. GORDON: No, Judge.

THE COURTL: Okay. All right. Would officers raise their right hands, please?

(At about 3:23 p.m. – deputies sworn by Court to take charge of jury)

THE COURT: All right. All rise for the jury. You may begin your deliberations

(At about 3:24 p.m. – jury retired to jury room)

(At about 3:25 p.m. – jury commenced deliberations)

THE COURT: All right. You may be seated.

Are there any objections to the Court's jury instructions?

MR HEAPHY: No, your Honor.

MR. GORDON: No, Judge.

THE COURT: All right. Thank you. All right. We're in recess. Stand by for a half hour.

(At about 3:27 p.m. – recess)

(At about 4:00 p.m. – jury excused

for the day)

(At about 4:01 p.m. – adjournment)

* *

Detroit, Michigan

Friday, June 13, 1997 – at about 12:44 p.m.

(Court, counsel and all parties present)

THE COURT: Let's bring the jury out.

THE DEPUTY: Would you take your seats in the jury box please?

(At about 12:45 p.m. – jury returned)

THE COURT: You may be seated.
Is the jury present and properly seated, counsel?

MR HEAPHY: Yes, your Hpnor.

MR. GORDON: Yes, Judge.

THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?

THE FOREPERSON: My name is Janice Bowden.

THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words is there a disagreement as to the verdict?

THE FOREPERSON: Yes, there is

THE COURT: All right. Do you believe

that it is hopelessly deadlocked?

THE FOREPERSON: The majority of us don't believe that—

THE COURT: (Interposing) Don't say what you're going to say, okay?

THE FOREPERSON: Oh, I'm sorry.

THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict or not?

THE FOREPERSON: (No response)

THE COURT: Yes or no?

THE FOREPERSON: No, Judge.

THE COURT: All right. I hereby declare a mistrial. The jury is dismissed.

(At about 12:48 p.m. – jury discharged)

THE COURT: Well, Mr. Gordon snuck away before we could set a new trial date.

THE DEPUTY: He's coming back, Judge.

THE COURT: Okay. It is going to be November 24th. I'll remand. Set a pretrial.

THE CLERK: Do you want a pretrial date for June 27th.

THE COURT: Okay. Take him in the back before we bring the jury out.

(At about 12:49 p.m. – jury discharged)

(At about 12:50 p.m. – proceedings concluded)

* *

OPPOSITION BRIEF

No. 09-338

In The
Supreme Court of the United States

PAUL RENICO, Warden,
Petitioner,

vs.

REGINALD LETT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY

*** BRIEF IN OPPOSITION ***

CERTIFICATE OF SERVICE

SUBMITTED BY:
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Detroit, Michigan 48226
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No. 09-338

In The
Supreme Court of the United States

PAUL RENICO, Warden,

Petitioner,

vs.

REGINALD LETT,

Respondent.
/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, REGINALD LETT, who is indigent, asks leave to file the attached Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit without prepayment of costs, and to proceed *in forma pauperis* pursuant to rule 39.

The Respondent's affidavit in support of this application is attached hereto.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____
MARLA R. McCOWAN (P 57218)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: October 19, 2009

No. 09-338

In The
Supreme Court of the United States

PAUL RENICO, Warden,

Petitioner,

vs.

REGINALD LETT,

Respondent.

/

CERTIFICATE OF SERVICE

Marla R. McCowan, Counsel of Record in this matter, hereby certifies that on October 19, 2009, that she mailed one copy of the following:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
AFFIDAVIT OF INDIGENCY

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

via first class U. S. Mail with postage prepaid to:
Mr. B. Eric Restuccia
Solicitor General
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1121

_____
MARLA R. McCOWAN (P 57218)

Iden #15080

No. 09-338

In The
Supreme Court of the United States

PAUL RENICO, Warden,

Petitioner,

vs.

REGINALD LETT,

Respondent.
/

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

SUBMITTED BY:
MARLA R. McCOWAN (P 57218)
Assistant Defender
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REASONS FOR DENYING THE WRIT

There Are No Compelling Reasons to Review the Decision of the Sixth Circuit Court of Appeals.

A. THE STATE COURT OF APPEALS, THE FEDERAL DISTRICT COURT, AND THE UNITED STATES COURT OF APPEALS APPROPRIATELY GRANTED RELIEF TO THE RESPONDENT.

The issue in this case centers around the lack of discretion exercised by the trial court in declaring a mistrial after the following exchange at the conclusion of Respondent's first trial:

> THE COURT: I received your note asking what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?
>
> THE FOREPERSON: My name is Janice Bowden.
>
> THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.
>
> THE COURT: All right. Do you believe that it is hopelessly deadlocked?
>
> THE FOREPERSON: The majority of us don't believe that--
>
> THE COURT: (Interposing) Don't say what you're going to say, okay?
>
> THE FOREPERSON: Oh, I'm sorry.
>
> THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict or not?
>
> THE FOREPERSON: (No response)
>
> THE COURT: Yes or no?
>
> THE FOREPERSON: No, Judge.
>
> THE COURT: All right, I hereby declare a mistrial. The jury is dismissed.

(At about 12:48 p.m. - jury discharged). (Petition *Appendix* at pages 93a-94a [transcript]).

After a mistrial was declared, Mr. Lett was convicted upon retrial of second degree murder on November 20, 1997. (*Id.* at 71a-72a [State Court of Appeals Opinion]). In direct appeal of that conviction, the Michigan Court of Appeals unanimously reversed Mr. Lett's convictions, finding that the trial court did not reasonably declare a mistrial, and that a retrial violated Respondent's rights against double jeopardy as guaranteed by the United States and Michigan Constitutions. (*Id.* at 74a-75a). Although Petitioner currently takes the position that "the discharge of the jury.....was correct" (Petition at 4), the original prosecutor assigned to the appeal 'acknowledged that the judge's precipitous declaration 'clearly was error'" during a post-conviction motion hearing. (Petition *Appendix* at 12a [United States Court of Appeals Opinion]).

The majority of the Michigan Supreme Court disagreed with the state Court of Appeals' analysis, and reinstated Mr. Lett's convictions over dissent by two Justices. *People v. Lett*, 466 Mich. 206 (2002). In so doing, the Michigan Supreme Court determined that the trial court acted reasonably when it concluded that the jury was deadlocked.

On habeas, however, the District Court found that the reasons cited by the Michigan Supreme Court to reinstate the convictions were "not particularly compelling" and did not provide an accurate portrayal or interpretation of the record. *Lett v. Renico*, 507 F. Supp. 2d 777, 785-787 (E.D. Mich. 2007) (finding, for

example, that "the foreperson did not 'expressly state that the jury was not going to reach a verdict' contrary to the Michigan Supreme Court's description of the exchange). In affirming the decision to grant habeas corpus relief, the majority panel of the United States Court of Appeals likewise found no record support to suggest that the trial court utilized "sound discretion" prior to declaring a mistrial. (Petition *Appendix* at 11a-15a [United States Court of Appeals Opinion]) ("the foreperson's response cannot carry the weight placed upon it by the Michigan Supreme Court"). The petition for rehearing or rehearing *en banc* was denied by the Sixth Circuit. (Petition *Appendix* at 76a [Order]).

The United States Court of Appeals for the Sixth Circuit determined that habeas corpus relief was appropriately granted by the District Court, because the Michigan Supreme Court's decision to reinstate Respondent's conviction was an unreasonable application of United States Supreme Court precedent. Specifically, the Sixth Circuit Court looked to *United States v. Perez*, 22 U.S. (9 Wheat) 579 (1824), *United States v. Jorn*, 400 U.S. 470 (1971) and *Arizona v. Washington*, 434 U.S. 497 (1978) to determine whether "sound discretion" was employed by the trial court. (Petition *Appendix* at 8a-9a [United States Court of Appeals Opinion]). On the facts of this case, the Michigan Supreme Court decision was an unreasonable application of United States Supreme Court precedent, requiring habeas corpus relief pursuant to 28 U.S.C. §2254(d). The Sixth Circuit (like the Federal District Court before it and the Michigan Court of Appeals originally) simply found no

record evidence to suggest that the trial court exercised "sound discretion" prior to declaring a mistrial:

> First, the trial judge declared a mistrial without pausing to hear from counsel, and the brief colloquy leading to the judge's declaration-lasting all of three minutes-was immediately followed by the dismissal of the jury, providing counsel no opportunity to object. Second, the record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving a "deadlocked jury" instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate. Any of these courses of action would have been reasonable, given that the jury had only deliberated for three or four hours in this first-degree murder trial. Third, and most troubling, the judge's declaration was inexplicably abrupt, making it 'abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial.' *Jorn*, 400 U.S. at 487, 91 S. Ct. 547.

(Petition *Appendix* at 11a-15a [United States Court of Appeals Opinion]).

The Petition takes issue with the lack of deference afforded to the trial court's decision. A trial court is afforded "broad discretion" pursuant to *Arizona v. Washington*, *supra*, but this Court does not endorse a "rubber stamp approach" on further review. *Lett v. Renico*, 507 F. Supp. 2d at 784. The Sixth Circuit recognized that *Perez*, *Jorn* and *Washington* require a reviewing court to carefully evaluate all of the circumstances that led to the declaration of a mistrial. (Petition *Appendix* at 9a-11a [United States Court of Appeals Opinion]). The Sixth Circuit did not narrowly fashion its decision from whole cloth; rather, the Court relied upon interpretations of this Court's precedent to determine that sound discretion was not exercised by the trial court in this case. Any perceived "conflict" among the circuits

cited by Petitioner is factually driven and does not involve an unclear standard of review or a lack of clearly established precedent from this Court. The Sixth Circuit's decision is soundly based on established Supreme Court precedent. The petition for writ of certiorari must be denied.

B. THERE ARE NO OTHER REASONS FOR GRANTING THE WRIT.

Respondent's constitutional right to be free from double jeopardy was clearly violated, and this case does not present any close questions. To be sure, every Court presented with this issue since the inception of this appeal has granted relief to the Respondent, save for the majority of the Michigan Supreme Court.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari must be denied.

STATE APPELLATE DEFENDER OFFICE

Counsel for Respondent

BY: _____

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Date: October 19, 2009

REPLY BRIEF

143

No. 09-338

Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

PAUL RENICO, WARDEN,
Petitioner,

v

REGINALD LETT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY BRIEF 1

1. For nearly two centuries this Court has consistently recognized a State trial court's discretion in finding manifest necessity. 2

2. The Michigan Supreme Court's decision, which was supported by the factual record, was not an unreasonable application of this Court's decisions. 4

3. The split among the circuits over what length of deliberations is required to support a declaration of manifest necessity due to a hung jury will cause defendants to be treated differently depending on the circuit where the trial occurs 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Arizona v. Washington,
434 U.S. 497 (1978) 2, 4, 5, 6

Carey v. Musladin,
549 U.S. 70 (2006) 6

Fay v. McCotter,
765 F.2d 475 (5th Cir. 1985) 8

Lindsey v. Smith,
820 F.2d 1137 (11th Cir. 1987) 8

People v. Lett,
644 N.W.2d 743 (2002) 3, 5

Richardson v. United States,
468 U.S. 317 (1984) 5

United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3rd Cir. 1975) 8

United States v. Gordy,
526 F.2d 631 (5th Cir. 1976) 8

United States v. Lorenzo,
570 F.2d 475 (9th Cir. 1978) 8

United States v. Perez,
22 U.S. (9 Wheat) 579 (1824) 2, 5, 8

Winston v. Moore,
452 U.S. 944 (1981) 3, 7

Cases (continued)

Wright v. Van Patterson,
128 S. Ct. 743 (2008) 6

Statutes

28 U.S.C. § 2254(d) 5

Other Authorities

Antiterrorism and Effective Death Penalty Act ..... passim

PETITIONER'S REPLY BRIEF

The U.S. Court of Appeals for the Sixth Circuit failed to apply 185 years of this Court's precedent that recognizes broad discretion in the trial court to make a manifest necessity determination based on a hung jury, and likewise, failed to apply deference to the State court determinations as mandated by the Antiterrorism and Effective Death Penalty Act. The State of Michigan is not aware of a single case in which this Court second-guessed a trial court's determination that a mistrial due to a deadlocked jury was proper based on manifest necessity.

There is no clearly established precedent from this Court to support the Sixth Circuit's conclusion that the State trial court was required to employ additional methods to ensure the jury was genuinely deadlocked. In doing so, the Sixth Circuit has forcefully undercut the State trial courts' discretion and injected uncertainty within the circuits regarding what the deadlocked jury test is. The Sixth Circuit further compounded its error by creating a framework whereby a federal court will second-guess a State court's factual determination in a manner that is nowhere to be found in this Court's decisions. These errors cast doubt on the States' ability to rely upon the AEDPA's proscriptions against expansive habeas review and the ability to protect proper convictions from unwarranted review.

Respondent cannot avoid the jurisprudential significance of this case by simply stating that the case is fact-bound. In doing so, Respondent proves the State's argument for three main reasons:

- 185 years' precedent from this Court recognizes a trial court's broad discretion in finding manifest necessity based upon the facts before it;

- The Michigan Supreme Court's decision that the State trial court acted appropriately in granting a mistrial on manifest necessity was not an unreasonable application of existing Supreme Court precedent and was supported by the record – a factual conclusion that warrants an additional layer of deference under AEDPA;

- If federal courts can second-guess the State trial court's factual determinations and the State appellate court's factual conclusions and application of this Court's precedent, the circuit where a defendant is convicted will affect the test to be employed in manifest-necessity determinations and the scope of a habeas court's review given the differences of application on this issue among the circuits.

1. **For nearly two centuries, this Court has consistently recognized a State trial court's discretion in finding manifest necessity.**

Since *United States v. Perez* in 1824, this Court has recognized that trial courts possess the discretion to declare a mistrial under the manifest-necessity standard based on a jury's inability to reach a verdict.[1] This Court has characterized that discretion as "broad discretion."[2] Moreover, in a denial of a petition for certiorari in *Winston v. Moore*, a habeas case, Justice Rehnquist noted in his dissent, "[N]or do I know of a single case from this Court which has ever overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the 'manifest necessity' standard had not been

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[1] *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

[2] *Arizona v. Washington*, 434 U.S. 497, 505-506, 509 (1978).

met."[3] It is clear that the trial court's factual determination of manifest necessity is not a province to be invaded lightly.

Here, in the first jury trial, the evidence was presented to the jury over the span of four days of testimony (June 3, 1997; June 5, 1997; June 11, 1997; and June 12, 1997), not including the voir dire and the deliberations. In two of these days, the jury was only present for two hours or less, and the total length of the trial on these four days comprised about *ten hours* of testimony, not including lunch breaks.[4]

The jury was instructed and began deliberating at 3:24 p.m. on June 12, 1997. Pet. App. 91a. The jury was excused for the day at 4:00 p.m. Pet. App. 318a. The jury resumed deliberations on June 13, 1997. Early on the second day of deliberations, the jury sent out a noted indicating that it had "*a concern about our voice levels disturbing other proceedings that might be going on.*"[5]

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[3] *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting).

[4] The trial testimony on June 3, 1997, began at 11:00 am where the jury was empanelled and concluded that day at 11:59 am, for a total of one hour. Pet. App. 78a-80a. On June 5, 1997, the jury began on the record at 10:18 am, and the court adjourned at 4:15 am. Pet. App. 81a, 85a. The jury broke for lunch at 12:00 noon and returned at 2:55 pm. Pet. App. 82a-84a. This is approximately three hours of trial time. On June 11, 1997, the trial court went on the record at 10:44 am and adjourned at 12:30 am, for a total of approximately two hours. Pet. App. 87a-88a. Finally, on June 12, 1997, the trial commenced at 10:00 am and the jury began to deliberate at 3:24 pm. Pet. App. 89a, 91a. With the lunch break running from 12:31 pm to 2:19 pm, Pet. App. 90a, there were four hours of work conducted on this day before deliberations. These four days then totaled approximately ten hours of trial time.

[5] *People v. Lett*, 644 N.W.2d 743, 746 n.2 (2002) (emphasis added). Pet. App. 42a.

During its deliberations, the jury sent out a total of *seven notes.*[6]

At about 12:45 p.m., the jury returned to the courtroom based on another note, asking what would happen if the jury could not agree: "*What if we can't agree? Mistrial? Retrial? What?*"[7] The trial court initially asked the foreperson whether the jury was "hopelessly deadlocked" and interrupted the foreperson when it appeared that the foreperson might disclose the current vote status of the jurors. Pet. App. 93a-94a. Subsequently, the trial court inquired from the foreperson whether the jury would be able to reach a unanimous verdict, and the foreperson stated, "*No, Judge.*" Pet. App. 93a-94a (emphasis added). At this point, the trial court declared a mistrial and discharged the jury. Pet. App. 94a. As this Court has noted, there has been no expressed "standard that can be applied mechanically or without attention to the particular problem confronting the trial judge."[8]

There was no objection by Respondent's trial counsel. Respondent was retried and convicted. The trial court's exercise of its discretion was consistent with *Perez's* longstanding principles.

2. The Michigan Supreme Court's decision, which was supported by the factual record, was not an unreasonable application of this Court's decisions.

The Michigan Supreme Court's decision that the State trial court acted appropriately in granting a mistrial

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[6] *Lett*, 644 N.W.2d at 746 n.2. Pet. App. 42a.

[7] *Lett*, 644 N.W.2d at 745-746 (emphasis added). Pet. App. 41a-42a.

[8] *Washington*, 434 U.S. at 506.

based on manifest necessity was not an unreasonable application of existing Supreme Court precedent and was supported by the record – a factual conclusion that warrants an additional layer of deference under AEDPA, so that habeas review does not become an invitation for federal courts to conduct post hoc de novo review of every State court action.

28 U.S.C. § 2254(d) requires that the State court decision be an unreasonable application of clearly established Supreme Court precedent. Here, the Michigan Supreme Court applied this Court's precedent in *Washington* and *Richardson*,[9] referencing *Perez*, for the correct proposition that declaration of a mistrial is within the trial court's broad discretion and a hung jury is the classic example of manifest necessity, warranting the jury's discharge.[10] Further, the Michigan Supreme Court was well aware of the coercive dangers of forcing a deadlocked jury to reach a verdict.[11] Specifically, the Michigan Supreme Court noted, "The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its *discussions may have been particularly heated.*"[12]

Contrary to Respondent's assertion that Michigan is a jurisprudential outlier, the Michigan Supreme Court was correct that there is no precedent from this Court that mandates that the State trial courts employ additional measures to ensure that the jury is genuinely

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[9] *Washington*, 434 U.S. at 506; *Richardson v. United States*, 468 U.S. 317 (1984).

[10] *Lett*, 644 N.W.2d at 747-753. Pet. App. 45a-61a.

[11] *Lett*, 644 N.W.2d at 751-752; Pet. App. 54a-55a, 58a.

[12] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

deadlocked.[13] Nor has this Court addressed the situation where jury deliberations had become acrimonious and the jury was discharged. In fact, this Court's recent habeas corpus jurisprudence reiterates the point that in the absence of clearly established Supreme Court precedent, there is no relief under AEDPA.[14] The Sixth Circuit chose to contest the facts properly determined by the State courts and create novel standards for manifest necessity determinations not present in this Court's precedent. Both actions violate AEDPA deference and invade the sovereign States' authority to conduct trials and achieve public justice.

The record was clear that the initial note on June 13, 1997 indicated heated discussions ("a concern about our voice levels"), a later note suggested that the jury was unable to agree on a verdict, and the foreperson clearly stated that the jury was deadlocked. Under the Sixth Circuit's strained analysis that this factual predicate is adequate for manifest necessity, which compromises AEDPA deference, the State trial court is left with a Hobson's choice: either declare a mistrial and risk second-guessing by the federal court on habeas review, or choose to disbelieve the jury's contentious deliberations and the foreperson's clear expression of a deadlock, thereby leaving "a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors."[15] Given the raised

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[13] *Lett*, 644 N.W.2d at 752, n. 13; Pet. App. 56a-57a. The Michigan Supreme Court's opinion is published and remains binding on Michigan's State courts.

[14] *Wright v. Van Patterson*, 128 S. Ct. 743, 747 (2008) (defendant pled to reckless homicide at a plea hearing where trial counsel participated by speakerphone); *Carey v. Musladin*, 549 U.S. 70, 74 (2006) (whether displaying of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial).

[15] *Washington*, 434 U.S. at 505-506.

voices, there was a legitimate fear that the deadlocked jurors might force a unanimous verdict if allowed to continue deliberating even if they had only been deliberating for four hours.

In referring to the role of the habeas court, Justice Rehnquist aptly noted in *Winston* that it is inappropriate for federal courts to second-guess the broad discretion granted a trial court confronted with a hung jury as well as to create new standards on habeas review:

> Either it simply "second-guessed" the state trial judge as to whether this particular jury could, after further deliberation, reach a verdict, or it created a principle of law that has never been sanctioned by this Court to the effect that a trial judge must interrogate each juror as to the possibility of reaching a verdict before it may declare a mistrial because the jury has "hung." Either one of these actions, with their concomitant affirmance by the Court of Appeals, merits plenary review here.

Justice Rehnquist's observation in *Winston* applies squarely to the Sixth Circuit's actions present here.

3. The split among the circuits over what length of deliberations is required to support a declaration of manifest necessity due to a hung jury will cause defendants to be treated differently depending on the circuit where the trial occurs.

Respondent ignores that the circuits are split on what length of deliberations is sufficient to warrant a declaration of manifest necessity for a hung jury. On

direct review in *United States v. Lorenzo*, the U.S. Court of Appeals for the Ninth Circuit determined that jury deliberating for three hours was sufficient under *Perez* to warrant a mistrial.[16] The Fifth and Eleventh Circuits also denied relief on double jeopardy grounds where the jury had only deliberated for three hours, both habeas cases.[17] In contrast, other circuits on direct review have found that a comparable amount of time deliberating to be inadequate to justify a finding of manifest necessity.[18] This split demonstrates that there is no clearly established Supreme Court precedent.

Here, the Sixth Circuit on habeas review concluded that the State trial courts are constitutionally required to do more – employing additional requirements not mandated by this Court. The Michigan Supreme Court correctly recognized and applied this Court's precedent, and further acknowledged the Hobson's choice of granting a mistrial or forcing the jury to deliberate longer, thereby risking a coerced verdict when the foreperson had clearly expressed that the jury could not reach a verdict and when deliberations were contentious. Further, the Sixth Circuit demonstrated a willingness to ignore AEDPA deference in order to contest the facts properly determined by the State courts, as well as create new law. The law applied in a habeas case should not depend on which circuit hears the case but rather on this Court's clearly established precedent.

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[16] *United States v. Lorenzo*, 570 F.2d 475, 477 (9th Cir. 1978).

[17] *Fay v. McCotter*, 765 F.2d 475, 477 (5th Cir. 1985); *Lindsey v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987).

[18] *United States v. Gordy*, 526 F.2d 631, 636-637 (5th Cir. 1976); *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034 (3rd Cir. 1975).

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

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Dated: October, 2009

PETITIONER'S BRIEF

15 (3)

No. 09-338

Supreme Court, U.S.
JAN 14 2010
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PAUL RENICO
Petitioner,

v.

REGINALD LETT
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly-established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

PARTIES TO THE PROCEEDING

Petitioner is Paul Renico, Warden of the Mid-Michigan Correctional Facility in Michigan. Petitioner was respondent-appellant in the United States Court of Appeals for the Sixth Circuit.

Respondent is Reginald Lett, a prisoner in a State correctional facility in Michigan, serving a sentence of 16-40 years' imprisonment for second-degree murder and felony-firearm. Respondent was the petitioner-appellee in the Sixth Circuit.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

1. The Crime and the Trial 4

2. The Habeas Review in Federal Court 9

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. The Michigan Supreme Court's decision – that the State trial court acted within its discretion in granting a mistrial after the foreperson confirmed that the jury was deadlocked – was not an unreasonable application of this Court's clearly-established precedent under AEDPA, 28 U.S.C. § 2254 16

A. This Court's clearly-established precedent has established two general propositions: (1) the declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections, and (2) a trial court's declaration of a mistrial due

to a deadlocked jury is accorded great deference. 17

1. The declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections. 19

2. This Court's clearly-established precedent has set forth that it is within the trial court's broad discretion to declare a mistrial due to a deadlocked jury..... 25

B. This Court's precedent has never permitted close scrutiny of a trial court's deadlocked jury determination and no clearly-established precedent mandates that the trial court employ additional methods to ensure that the jury is deadlocked. Rather, the Michigan Supreme Court reasonably applied this Court's precedent. 35

1. This Court has narrowly drawn what constitutes clearly-established precedent..... 35

2. In the absence of any clearly-established, constitutionally-required additional measures or considerations to measure whether the trial court exercised sound discretion, the circuits have recognized a range of guideposts to assist in the inquiry..... 41

3. **The Michigan Supreme Court reasonably applied this Court's clearly-established precedent when it reviewed the trial court's declaration of a mistrial due to a deadlocked jury. . 43**

CONCLUSION..... 53

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Washington,
434 U.S. 497 (1978) ..... passim

Carey v. Musladin,
549 U.S. 70 (2006) 36, 37

Downum v. United States,
372 U.S. 734 (1963) 29

Dreyer v. Illinois,
187 U.S. 71 (1902) 26

Fay v. McCotter,
765 F.2d 475 (5th Cir. 1985) 39

Fulton v. Moore,
520 F.3d 522 (6th Cir. 2008) 48

Gori v. United States,
367 U.S. 364 (1961) 22, 29, 30

Green v. Johnson,
160 F.3d 1029 (5th Cir. 1998) 50

Green v. United States,
355 U.S. 184 (1957) 20

Illinois v. Somerville,
410 U.S. 458 (1973) ..... passim

Keerl v. State of Montana,
213 U.S. 135 (1909) 26

Knowles v. Mizayance,
556 U.S. ____;
129 S. Ct. 1411 (2009) 18

Lett v. Renico,
316 F. App'x 421 (6th Cir. 2009) ..... passim

Lett v. Renico,
507 F. Supp.2d 777 (E.D. Mich. 2007) 1, 9, 10

Lindh v. Murphy,
521 U.S. 320 (1997) 17

Lindsay v. Smith,
820 F.2d 1137 (11th Cir. 1987) 39

Logan v. United States,
144 U.S. 263 (1892) 26

Oregon v. Kennedy,
456 U.S. 667 (1982) 20

People v. Lett,
466 Mich. 206; 644 N.W.2d 743 (2002) ..... passim

People v. Lett, No. 209513, 2000 Mich. App. LEXIS 1841
(released on April 21, 2000) 1, 8

Richardson v. United States,
468 U.S. 317 (1984) 23, 51

Smith v. Spisak,
558 U.S. _____;_____ S. Ct. _____; _____ L. Ed. 2d _____; slip op. at 9 (January 12, 2010) 37, 48

United States v. Byrski,
854 F.2d 955 (7th Cir. 1988) 43

United States ex rel. Webb v. Court of Common Pleas,
516 F.2d 1034 (3rd Cir. 1975) 40, 41

United States v. Charlton,
502 F.3d 1 (1st Cir. 2007) 42

United States v. Cronic,
466 U.S. 648 (1984) 36

United States v. Gordy,
526 F.2d 631 (5th Cir. 1976) 30, 39, 40

United States v. Hernandez-Guardado,
228 F.3d 1017 (9th Cir. 2000) 39, 43

United States v. Jorn,
400 U.S. 470 (1970) 22, 31

United States v. Lorenzo,
570 F.2d 294 (9th Cir. 1978) 39, 43

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) ..... passim

United States v. Razmilovic,
507 F.3d 130 (2nd Cir. 2007) 42

United States v. Sanford,
429 U.S. 14 (1976) 23, 51

United States v. Wecht,
541 F.3d 493 (3rd Cir. 2008)
cert. denied 129 S. Ct. 658 (2008) 42

Wade v. Hunter,
336 U.S. 684 (1949) 22

Weaver v. Thompson,
197 F.3d 359 (9th Cir. 1999) 50

Williams v. Taylor,
529 U.S. 362 (2000) 17

Winston v. Moore,
452 U.S. 944 (1981) 34, 37, 50

Wright v. Van Patten,
552 U.S. 120 (2008) 36

Yarborough v. Alvarado,
541 U.S. 652 (2004) 18, 38

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254 ..... passim
28 U.S.C. § 2254(d) 19, 35
28 U.S.C. § 2254(d)(1) 17
28 U.S.C. § 2254(e)(1) 50
Mich. Comp. Law § 750.227b 4
Mich. Comp. Law § 750.317 4

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *Lett v. Renico*, affirming the district court's grant of habeas corpus is an unreported decision filed on March 10, 2009.[1] The Sixth Circuit's order denying a motion for rehearing is unpublished. Pet. App. 76a. The district court decision granting habeas relief is published.[2]

The decision of the Michigan Supreme Court in *People v. Lett* is reported.[3] The decision of the Michigan Court of Appeals is unpublished.[4]

JURISDICTION

The State of Michigan filed a motion for rehearing with a suggestion for rehearing en banc of the Sixth Circuit's March 10, 2009, decision, which was denied by that Court in a May 29, 2009, order. Pet. App. 76a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Sixth Circuit found that there was a violation of the right against double jeopardy under the Fifth Amendment.

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[1] *Lett v. Renico*, 316 F. App'x 421 (6th Cir. 2009); Pet. App. 1a-17a.

[2] *Lett v. Renico*, 507 F. Supp. 2d 777 (E.D. Mich. 2007); Pet. App. 18a-38a.

[3] *People v. Lett*, 466 Mich. 206; 644 N.W.2d 743 (2002); Pet. App. 39a-67a.

[4] *People v. Lett*, No. 209513, 2000 Mich. App. LEXIS 1841 (released on April 21, 2000). Pet. App. 68a-75a.

The Fifth Amendment prohibits a person from being "twice put in jeopardy of life or limb."

Lett challenged the basis of his confinement under 28 U.S.C. § 2254 of the Antiterrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A State jury convicted Reginald Lett of second-degree murder under Mich. Comp. Law § 750.317 and possession of a firearm during the commission of a felony, Mich. Comp. Law § 750.227b. Lett was sentenced to consecutive terms of 16-to-40 years for the second-degree murder conviction and two years for the felony-firearm conviction. This conviction resulted from his second jury trial. In the first jury trial, the State trial court declared a mistrial and discharged the jury after determining that the jury was deadlocked and unable to reach a verdict.

1. The Crime and the Trial

The Michigan Supreme Court succinctly described the crime:

> On August 29, 1996, Adesoji Latona, a taxi driver, was fatally shot at a Detroit liquor store. Latona was apparently confronted by a group of men, including defendant [Reginald Lett], as he entered the liquor store. One of the men, Charles Jones, accused Latona of throwing him out of Latona's cab, and an argument ensued inside the store. Latona's girlfriend testified that she saw [Lett] draw a gun, after which she heard two gunshots. In a statement given to police following the incident, [Lett] admitted that he was at the party store at the time of the shooting and that he and Jones had fought with Latona inside the store. [Lett] further stated that he had

> retrieved a gun from another friend in the parking lot, and that he went back inside and fired the gun into the air before running back outside. Latona died from two gunshot wounds, one to the head and one to the chest.[5]

In the first jury trial, evidence was presented to the jury during four days of testimony (June 3, 1997; June 5, 1997; June 11, 1997; and June 12, 1997), not including voir dire and deliberations. In two of these days, the jury was only present for two hours or less, and the total length of the trial on these four days comprised about ten hours of testimony, not including lunch breaks.[6]

The jury was instructed and began deliberating at 3:24 p.m. on June 12, 1997. Pet. App. 91a. The jury was excused for the day at 4:00 p.m. Pet. App. 91a.

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[5] *Lett*, 644 N.W.2d at 745;Pet. App. 40a-42a.

[6] The trial testimony on June 3, 1997, began at 11:00 a.m. where the jury was empaneled and concluded on that day at 11:59 a.m., for a total of one hour. Pet. App. 78a-80a. On June 5, 1997, the jury began on the record at 10:18 a.m., and the court adjourned at 4:15 p.m. Pet. App. 81a, 85a. The jury broke for lunch at 12:00 noon and returned at 2:55 p.m. Pet. App. 82a-84a. This is approximately three hours of trial time. On June 11, 1997, the trial court went on the record at 10:44 a.m. and adjourned at 12:30 p.m., for a total of approximately two hours. Pet. App. 87a-88a. Finally, on June 12, 1997, the trial commenced at 10:00 a.m. and the jury began to deliberate at 3:24 p.m. Pet. App. 89a, 91a. With the lunch break running from 12:31 p.m. to 2:19 p.m., Pet. App. 90a, there were approximately four hours of work conducted on this day before deliberations. These four days then totaled approximately ten hours of trial time.

The jury resumed deliberations on June 13, 1997.[7] Pet. App. 93a. Early on the second day of deliberations, the jury sent out a note indicating that it had "a concern about our voice levels disturbing any other proceedings that might be going on."[8] During two days of deliberations, the jury sent out a total of seven notes.[9]

At about 12:45 p.m. on the second day of deliberations, the jury returned to the courtroom to address another note, asking what would happen if the jury could not agree: "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?' "[10] The State trial court concluded from the note that the jury might be deadlocked, and asked questions of the foreperson regarding the matter:

> THE COURT: I received your note asking me what if you can't agree? [sic] And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves [sic], please?
>
> THE FOREPERSON: My name is Janice Bowden.

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[7] It is not entirely clear from the record when the jury began deliberations on June 13, 1997. It appears as though the Michigan Supreme Court presumed that the jury began at 9:00 a.m. *Lett*, 644 N.W.2d at 745, 746 n.1 (estimating "four or five hours of deliberations"); Pet. App. 41a-42a. *See* also *Lett*, 644 N.W.2d at 755, n.1 (Cavanagh, J., dissenting); Pet. App. 64a.

[8] *Lett*, 644 N.W.2d at 746 n.2; Pet. App. 42a.

[9] *Lett*, 644 N.W.2d at 746 n.2; Pet. App. 42a.

[10] *Lett*, 644 N.W.2d at 745; Pet. App. 41a.

THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there disagreement as to the verdict?

THE FOREPERSON: Yes, there is.

THE COURT: All right. Do you believe that it is hopelessly deadlocked?

THE FOREPERSON: The majority of us don't believe that--

THE COURT: (Interposing) Don't say what you're going to say, okay?

THE FOREPERSON: Oh, I'm sorry.

THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?

THE FOREPERSON: (No response)

THE COURT: Yes or no?

THE FOREPERSON: No, Judge. [Pet. App. 93a-94a.]

At this point, the trial court declared a mistrial and discharged the jury. Pet. App. 94a. There was no objection by Respondent.

On retrial, Respondent Reginald Lett was convicted of second-degree murder.[11] There was no objection or motion to dismiss on the basis of double jeopardy. Lett appealed his conviction to the Michigan Court of Appeals, arguing for the first time that the trial court erred in granting a mistrial because there was no manifest necessity.[12] The Michigan Court of Appeals found that the grant of a mistrial was improper and reversed.[13] The Michigan Supreme Court reversed the Michigan Court of Appeals, reinstating Lett's conviction.[14]

In affirming the State trial court's decision to discharge the deadlocked jury, the Michigan Supreme Court found that the record substantiated the fact that the jury was not going to be able to reach a verdict.[15] Specifically, the Michigan Supreme Court noted that the trial was not complex and relatively short, and the jury had deliberated for at least four hours.[16] Next, the Michigan Supreme Court recognized that the jury had sent several notes, including one that could be interpreted as jury deliberations having turned acrimonious.[17] Finally, the Michigan Supreme Court determined that the jury had indicated a deadlock

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[11] *Lett*, 644 N.W.2d at 746; Pet. App. 43a.

[12] *Lett*, 644 N.W.2d at 746; Pet. App. 43a.

[13] *Lett*, 2000 Mich. App. LEXIS 1841; Pet. App. 73a-75a.

[14] *Lett*, 644 N.W.2d at 754; Pet. App. 61a.

[15] *Lett*, 644 N.W.2d at 752-753 (citing *Arizona v. Washington*, 434 U.S. 497, 515-517 (1978)); Pet. App. 56a.

[16] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

[17] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

through the colloquy between the trial court and the foreperson.[18]

For these reasons, the Michigan Supreme Court concluded that the record provided sufficient justification and "[t]he reasons were plain and obvious" through the foreperson's indication of deadlock.[19] Therefore, the Michigan Supreme Court held that the trial judge did not abuse her discretion, that manifest necessity existed to discharge the jury, and that there was no bar to Lett's retrial under double-jeopardy protections.[20]

2. The Habeas Review in Federal Court

On habeas review, the federal district court revisited the mistrial issue and disagreed with the Michigan Supreme Court's resolution:

> It is the state supreme court's determination that the record in this case demonstrates a "high degree" of necessity to declare a mistrial that the petitioner challenges, and with which this Court cannot agree.[21]

This decision was based in part on the federal district court's factual analysis where it found that "there is nothing in this record that lends support to the [State court's] conclusion that the jury was overwhelmed with

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[18] *Lett*, 644 N.W.2d at 753; Pet. App. 59a-60a.

[19] *Lett*, 644 N.W.2d at 754; Pet. App. 61a.

[20] *Lett*, 644 N.W.2d at 753-754; Pet. App. 59a, 61a.

[21] *Lett*, 507 F. Supp. 2d at 784; Pet. App. 29a.

disharmony or that it would not be able to reach a unanimous verdict given sufficient time."[22] The district court granted habeas relief finding a violation of the Double Jeopardy Clause.[23]

On appeal, the Sixth Circuit reviewed the Michigan Supreme Court's conclusions and, in a split decision, suggested that the jury was not really deadlocked, and that the jury may well have reached a verdict if allowed to deliberate further:

> [I]t would be remarkable if the jurors had had time even to review the testimony of the seventeen witnesses in the brief span of three or four hours (broken into two days and punctuated by breaks), much less reach a conclusion that they were hopelessly deadlocked. The extremely serious nature of the crime and the potential punishment for the defendant also suggests that the jury should have been permitted more time to deliberate. Juries often initially report themselves deadlocked after several hours and then proceed to reach unanimous verdicts.[24]

The Sixth Circuit rejected the Michigan Supreme Court's determination that the trial court had exercised sound discretion. Instead, the Sixth Circuit found that "the trial judge's actions exhibited haste

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[22] *Lett*, 507 F. Supp. 2d at 786; Pet. App. 34a.

[23] *Lett*, 507 F.Supp.2d at 788; Pet. App. 37a.

[24] *Lett*, 316 F. App'x at 427; Pet. App. 13a.

and lack of consideration for Lett's rights that fell short of the sound discretion required."[25]

In reaching its own conclusion regarding the events surrounding the declaration of the mistrial, the Sixth Circuit interpreted differently the jury's note asking what would happen if the jury could not agree as merely asking for more information.[26] Likewise, the Sixth Circuit dismissed the significance of another note regarding raised voice levels as "the jurors may simply have been concerned that they were disrupting other proceedings."[27] Next, the Sixth Circuit supposed "the judge improperly conflated deadlock with mere disagreement . . . ."[28] Finally, the Sixth Circuit opined that the State trial court "insist[ed] on haste and refus[ed] to allow the foreperson to elaborate, combin[ing that] with the judge's already-expressed opinion that the jury was deadlocked, exerted inappropriate pressure to acquiesce in the judge's conclusion."[29]

In the Sixth Circuit's opinion, the State trial court should have done more. Specifically, the Sixth Circuit determined that the trial court should have consulted with counsel after the colloquy.[30] The Sixth Circuit further concluded that "the record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving

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[25] *Lett*, 316 F. App'x at 426; Pet. App. 11a.

[26] *Lett*, 316 F. App'x at 427; Pet. App. 11a.

[27] *Lett*, 316 F. App'x at 427; Pet. App. 13a.

[28] *Lett*, 316 F. App'x at 426; Pet. App. 11a.

[29] *Lett*, 316 F. App'x at 427; Pet. App. 12a.

[30] *Lett*, 316 F. App'x at 428; Pet. App. 14a.

a 'deadlocked jury' instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate."[31] "Any of [those additional methods]," according to the Sixth Circuit "would have been reasonable."[32] Finally, the Sixth Circuit concluded that the State trial court had acted too abruptly.[33]

For these reasons, the Sixth Circuit affirmed the district court's grant of habeas relief.[34]

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[31] *Lett*, 316 F. App'x at 428; Pet. App. 14a-15a.

[32] *Lett*, 316 F. App'x at 428; Pet. App. 15a.

[33] *Lett*, 316 F. App'x at 428; Pet. App. 15a.

[34] *Lett*, 316 F. App'x at 428; Pet. App. 15a.

SUMMARY OF ARGUMENT

On habeas review, a State trial court's declaration of a mistrial due to manifest necessity arising from a deadlocked jury is entitled to two layers of deference. First, the Antiterrorism and Effective Death Penalty Act (AEDPA) requires that a State court's decision receive deference, unless it is an unreasonable application of clearly-established United States Supreme Court precedent. Second, the underlying State trial court is granted broad discretion in making a sound determination that there is manifest necessity to declare a mistrial. The Sixth Circuit's decision that double jeopardy barred Lett's second trial for murder cannot stand when these two layers of deference are faithfully applied.

What constitutes clearly-established precedent is narrowly drawn. This Court has clearly established that if a mistrial is declared because of manifest necessity due to a deadlocked jury, a subsequent trial is not barred by double-jeopardy protections. Since 1824, in *United States v. Perez*, this Court has recognized the trial court's sound discretion in making a manifest necessity declaration – the paradigm of manifest necessity being a hung jury – and the existence of a deadlocked jury does not bar subsequent retrial. Additionally, this Court has clearly established that a trial court is granted broad discretion with which to exercise its sound judgment. The exercise of this discretion is due *great* deference.

This Court has given some indication as to what does not fall within the trial court's broad discretion, by suggesting in *Arizona v. Washington* that certain situations fall below the constitutional floor of the

exercise of sound discretion, when the trial court acts: (1) irrationally, (2) irresponsibly, or (3) for reasons unrelated to the purported trial problem giving rise to the declaration of a mistrial. These circumstances have never been established as the set test to measure all mistrial scenarios as falling above or below the constitutional threshold. However, they are the best measures that are consistent with broad discretion and the deference necessary for situations that face trial courts in declaring a mistrial, especially the paradigm example – a deadlocked jury. But this Court has never clearly established that a trial court must force the jury to deliberate for a certain length of time or employ additional measures to ensure a jury is deadlocked.

Here, the Michigan Supreme Court reasonably applied this Court's clearly-established precedent, recognizing the broad discretion given a trial court when faced with facts warranting a mistrial. Further, the Michigan Supreme Court applied this Court's precedent recognizing the countervailing concerns of a defendant's right to have his case decided by a single tribunal and the jury's reaching a non-coerced verdict.

Because the Michigan Supreme Court reasonably applied this Court's precedent, that decision is due deference under AEDPA. The Sixth Circuit erred when it held that the State trial court was required to take additional steps before declaring a mistrial. In fact, such a requirement is nowhere to be found in this Court's precedent. The result was that the Sixth Circuit failed to accord the Michigan Supreme Court's decision the requisite deference.

On the merits, there is no authority from this Court that authorizes an open-ended inquiry, even on direct review, into whether a trial court exercised sound discretion. When, as here, prior to declaring a mistrial, a trial court receives: (1) a note indicating possible acrimonious deliberations, (2) a note indicative of a potential deadlock, and (3) the foreperson confirms that the jury is deadlocked, it is the paradigm exercise of sound discretion. If this is untrue, trial courts will either force continued deliberations for an unspecified amount of time and implement unspecified measures thereby risking a coerced verdict or declare that there is manifest necessity, which will open that decision to second-guessing. For these reasons, the Sixth Circuit should be reversed.

ARGUMENT

I. The Michigan Supreme Court's decision – that the State trial court acted within its discretion in granting a mistrial after the foreperson confirmed that the jury was deadlocked – was not an unreasonable application of this Court's clearly-established precedent under AEDPA, 28 U.S.C. § 2254.

This Court's clearly-established precedent establishes two general propositions regarding review of a trial court's declaration of a mistrial: (1) the declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections, and (2) a trial court's exercise of sound discretion in declaring a mistrial due to a deadlocked jury is accorded great deference. Here, the Michigan Supreme Court's decision reasonably applied this precedent. Then, the inquiry turns to whether there is any clearly-established precedent that would support the Sixth Circuit's conclusions that the State trial court was constitutionally required to employ additional methods to ensure that the jury was deadlocked. A review of this Court's decisions establishes that there is no such precedent.

The State court decisions are viewed through the two lenses of deference: AEDPA deference to the Michigan Supreme Court's conclusions and the deference given to a trial court's declaration of manifest necessity due to a deadlocked jury.

A. This Court's clearly-established precedent has established two general propositions: (1) the declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections, and (2) a trial court's declaration of a mistrial due to a deadlocked jury is accorded great deference.

With the enactment of AEDPA, Congress modified how federal courts reviewed State court judgments on habeas review.[35] Generally, under AEDPA, federal courts no longer may conduct an independent review of State court judgments on the merits, but, instead, federal courts are to employ a "highly deferential standard" of review.[36] AEDPA therefore requires that habeas relief be denied unless the State court decision was "contrary to, or involved an unreasonable application of, clearly-established Supreme Court precedent."[37] And the decision regarding what constitutes "clearly established" Supreme Court precedent is derived from this Court's holdings at the time of the relevant State court adjudication, rather than from obiter dictum.[38] Thus, the decision of the State court must not be just "incorrect," it must also be "objectively unreasonable."[39]

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[35] *Williams v. Taylor*, 529 U.S. 362, 403-404 (2000).

[36] *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997).

[37] 28 U.S.C. § 2254(d)(1).

[38] *Williams*, 529 U.S. at 412.

[39] *Williams*, 529 U.S. at 409, 411-412.

This Court has also consistently drawn a distinction between State court decisions applying a general, broad constitutional standard and those decisions that apply a narrow rule. Where a broad standard is at issue, State court decisions are given greater leeway:

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.[40]

Likewise, in *Knowles v. Mirzayance*, this Court held that ineffective assistance of counsel claims must be given extra latitude in light of the general nature of the rule: "because the *Strickland* standard is a general standard, a State court has even more latitude to reasonably determine that a defendant has not satisfied that standard."[41] Here, the standard is also general to determine whether the trial court acted within its sound discretion.

Thus, in cases where a trial court has declared a mistrial and the State appellate courts have affirmed, this Court should require the reviewing habeas court to first look to the standard used by the State court, and

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[40] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

[41] *Knowles v. Mizayance*, 556 U.S. ___; 129 S. Ct. 1411, 1420 (2009).

then examine the State court's application of the facts to that standard. This analysis of the facts, however, should not be an independent review. The review of the State court decision should examine the legal reasoning – the facts cited, whether these facts were supported by the record, whether the inferences from them were within the range of reasonable conclusions, and whether the application of the standards correlated to the facts. Such an examination would thereby require the reviewing court to examine the process of analysis by the State courts and thus would honor and give meaning to the distinction between a decision that may be erroneous and one that is objectively unreasonable. Without such guidance, the reality is that the AEDPA review will effectively be an independent or de novo review with some lip service being given to the legal standards of AEDPA. In short, the limitations established by Congress in § 2254(d) will have been disregarded.

1. **The declaration of a mistrial because of manifest necessity arising from a deadlocked jury and subsequent retrial does not violate double-jeopardy protections.**

The Double Jeopardy Clause ensures the finality of criminal judgments and protects an accused's right to have his trial completed by a particular tribunal.[42] The underlying rationale to a bar of double jeopardy "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual . . . thereby subjecting him to

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[42] *Arizona*, 434 U.S. at 503-504.

embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[43]

But when there is manifest necessity, the Double Jeopardy Clause does not prohibit a second trial.[44] Manifest necessity is met when there is a "high degree" of necessity, and the situation where the jury is unable to reach a verdict is the "classic basis" of manifest necessity.[45] "[T]he trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial."[46]

This Court's seminal case, which examined a trial court's decision to declare a mistrial based on a jury's inability to reach a verdict, is *United States v. Perez*.[47] There, the Court noted that trial courts have the inherent authority to discharge a deadlocked jury:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.[48]

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[43] *Green v. United States*, 355 U.S. 184, 187 (1957).

[44] *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824)).

[45] *Arizona*, 434 U.S. at 505-506, 509.

[46] *Arizona*, 434 U.S. at 509.

[47] *Perez*, 22 U.S. (9 Wheat.) at 580.

[48] *Perez*, 22 U.S. (9 Wheat.) at 580.

The recognition that a defendant can be retried after a deadlocked jury and the purpose for this allowance were succinctly identified by this Court in *Arizona v. Washington*:

> [W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.[49]

Likewise, thirty years prior to *Arizona*, this Court similarly recognized in *Wade v. Hunter* that a defendant should not automatically receive a windfall benefit when the jury deadlocks:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion

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[49] *Arizona*, 434 U.S. at 509.

> impossible, such as the failure of a jury to agree on a verdict.[50]

An unyielding right for a defendant to have his case tried by a single tribunal would thwart society's countervailing interest in seeking a just judgment for those breaking its laws:

> In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. . . . What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.[51]

Without recognizing the discretion of trial courts to assess the particular situation before it and to balance society's and the defendant's competing interests, trial courts would be forced "to navigate a narrow compass between Scylla and Charybdis . . . . [and] make [trial courts] unduly hesitant conscientiously to exercise their most sensitive judgment . . . ."[52]

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[50] *Wade v. Hunter*, 336 U.S. 684, 688-689 (1949).

[51] *Wade*, 336 U.S. at 689.

[52] *Gori v. United States*, 367 U.S. 364, 369-370 (1961) (eagerness of trial judge to declare mistrial was for the protection and benefit of the defendant); *but see* plurality opinion in *United States v. Jorn*, 400 U.S. 470, 483 (1970) (questioning a post hoc review based on who benefited from the mistrial).

Further, in *United States v. Sanford*, a jury trial resulted in a hung jury, and the trial court declared a mistrial.[53] The district court dismissed the indictment, the government appealed, and the Ninth Circuit affirmed, after an intervening remand by this Court.[54] This Court, in addressing the same issue here, granted certiorari and summarily reversed in a per curiam opinion, holding, "The situation of a hung jury presented here is precisely the situation that was presented in *Perez*, . . . and therefore the Double Jeopardy Clause does not bar retrial of these respondents on the indictment which had been returned against them."[55]

Also in *Richardson v. United States*, the jury convicted the defendant on several of the counts but hung on others, and the trial court declared a mistrial.[56] This Court rejected the idea that a hung jury terminated jeopardy allowing the defendant to assert a valid claim of double jeopardy and that a hung jury was the equivalent of an appellate court's finding of insufficient evidence, which operates for double jeopardy purposes as an acquittal.[57] In doing so, this Court relied upon *Perez* and its progeny.[58]

These considerations are seen in other double jeopardy contexts as well. For example, in *Illinois v. Somerville*, the defendant was indicted, the case was

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[53] *United States v. Sanford*, 429 U.S. 14, 14 (1976) (per curiam).

[54] *Sanford*, 429 U.S. at 14-15.

[55] *Sanford*, 429 U.S. at 16.

[56] *Richardson v. United States*, 468 U.S. 317, 318 (1984).

[57] *Richardson*, 468 U.S. at 323-326.

[58] *Richardson*, 468 U.S. at 323-326.

set for trial, and the jury was impaneled and sworn.[59] The prosecutor realized a fatal error in the indictment, and the error could not be remedied by amendment.[60] The trial court granted the State's request for a mistrial, and the defendant was again indicted by the grand jury but without the error.[61] The Seventh Circuit granted habeas relief, but this Court reversed, noting that proceeding with the trial would have built in an error.[62] This was because a double jeopardy bar would have forced the matter to be resolved on appeal, before a second trial could take place, thus wasting the resources of all involved.[63]

This Court's precedent is clear that if the jury was deadlocked, the trial court's discharging of the jury and Lett's subsequent retrial, would not be barred by Double Jeopardy.

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[59] *Illinois v. Somerville*, 410 U.S. 458, 459 (1973).

[60] *Somerville*, 410 U.S. at 459-460.

[61] *Somerville*, 410 U.S. at 460.

[62] *Somerville*, 410 U.S. at 460-461.

[63] *Somerville*, 410 U.S. at 460.

2. This Court's clearly-established precedent has set forth that it is within the trial court's broad discretion to declare a mistrial due to a deadlocked jury.

This Court's precedent clearly establishes that a trial court is granted broad discretion to declare a mistrial due to a deadlocked jury. In exercising this broad discretion the trial court must act soundly. This Court has also identified what does *not* constitute an exercise of sound discretion by the trial court – trial court's actions that are irrational or irresponsible or unrelated to the alleged problem giving rise to manifest necessity. It is less apparent, however, and not clearly established, what all the affirmative examples are of when a trial court has exercised sound discretion. But the classic example of sound discretion remains where a trial court declares a mistrial because the jury is deadlocked, i.e., a situation presenting the highest degree of necessity.

As to the trial court's broad discretion to discharge the jury, this Court in *Perez* recognized the exercise of sound discretion naturally rests with judges:

> They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases

> especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office.[64]

Perez has been adhered to in subsequent Supreme Court decisions in which the decision discharging the jury based on the fact that the jury was unable to reach a verdict was upheld.[65]

Consistent with *Perez*, this Court's later cases commenting on the manifest necessity determination from a deadlocked jury have concluded that the trial court's exercise of discretion in finding manifest necessity did not constitute a double-jeopardy violation when a defendant was retried.

For example, in the context whether a deadlocked jury may be discharged, this Court in *Arizona* recognized a general standard and explained

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[64] *Perez*, 22 U.S. (9 Wheat.) at 580.

[65] *See*, e.g., *Keerl v. State of Montana*, 213 U.S. 135, 137 (1909); and *Logan v. United States*, 144 U.S. 263, 298 (1892). *See also Dreyer v. Illinois*, 187 U.S. 71, 85 (1902) ("It seems to be undisputed that the case was submitted to the jury at 4 o'clock in the afternoon, and that the jury, having retired to consider of their verdict, were kept together until 9 o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case.").

that the trial court enjoys "broad discretion" because of the competing considerations of maintaining the particular tribunal and the fear of coercing that tribunal to reach a verdict:

> [I]n this situation there are especially compelling reasons for allowing the trial judge to exercise *broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury*. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.[66]

That is, a State trial court, when faced with a jury that appears to be unable to reach a verdict, must balance competing interests – the defendant's right of having his guilt determined by a particular tribunal, ensuring that the particular tribunal is not coerced into reaching a hasty verdict, and the public's interest in a justice for those violating its laws. When it does so, the trial court is making a "rational determination designed to implement a legitimate state policy."[67]

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[66] *Arizona*, 434 U.S. at 509 (emphasis added).

[67] *Somerville*, 410 U.S. at 469.

The situation that confronted the State trial court here is the classic example of these competing interests. If the State trial court forced further deliberations it might have resulted in a coerced verdict. The jury had already sent a note about raised voices that can reasonably be interpreted as evincing acrimonious deliberations. Further, another note, which immediately preceded the State trial court's colloquy with the foreperson, indicated questions about what would happen if the jury could not agree. Most importantly, the foreperson indicated that the jury was deadlocked. The Michigan Supreme Court was aware of the dangers of a coerced verdict.[68]

This Court further recognized in *Arizona* that a manifest necessity determination is a spectrum analysis that depends on the basis for the mistrial, which dictates how closely the trial court's decision should be scrutinized:

> Thus, the strictest security is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.
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> At the other extreme is the mistrial premised upon the *trial judge's belief that*

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[68] *Lett*, 644 N.W.2d at 751 (citing *Arizona*, 434 U.S. at 509-510); Pet. App. 54a-55a.

> *the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial.*[69]

This is what occurred here – the State trial court granted a mistrial because the jury was deadlocked.

The discretion involved in this case is in sharp contrast to a situation where there are successive prosecutions to harass an accused or for the prosecution to obtain a more favorable chance to convict; this case involved a deadlocked jury.[70] This Court has "consistently declined to scrutinize with sharp surveillance the exercise of that discretion," even in cases not involving deadlocked juries.[71] It is one decision that historically has been "accorded great deference" and "special respect."[72] As long as the record provides "sufficient justification," there is no basis to second-guess.[73]

Although this Court's precedent has clearly established that a trial court possesses broad discretion and its decision is entitled to deference, the question remains as how to qualify the trial court's decision – whether it acted soundly or not. The corresponding

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[69] *Arizona*, 434 U.S. at 508-509 (footnotes omitted) (emphasis added).

[70] *See Gori*, 367 U.S. at 369; *see also Downum v. United States*, 372 U.S. 734, 735 (1963) (missing key prosecution witness and the accused moved for dismissal of those counts – trial court denied the motion and declared a mistrial).

[71] *Gori*, 367 U.S. at 368.

[72] *Arizona*, 434 U.S. at 510.

[73] *Arizona*, 434 U.S. at 516-517.

answer has its genesis in this Court's reference in *Perez* to the trial court exercising sound discretion.[74]

This Court's precedent has established general parameters of when a trial court has *not* exercised sound discretion within the broad discretion granted it to make manifest necessity determinations. These parameters demonstrate situations that fall below the floor of sound discretion and are not inclusive as a test for sound discretion. "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment ...."[75] These circumstances generally fall into categories where the trial court abuses his authority by allowing the prosecution to gain a tactical advantage through a mistrial or permits "successive, oppressive prosecutions."[76] None of these is present here.

For example, although the question before this Court in *Arizona* was whether improper comment by defense counsel formed a proper basis for a mistrial, this Court concluded that, in a deadlocked jury scenario, declaration of a mistrial warrants close scrutiny "*if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling . . . .*"[77] This proposition parallels the Court's later expression of what is *not*

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[74] *Perez*, 22 U.S. (9 Wheat.) at 580.

[75] *Gori*, 367 U.S. at 369.

[76] *Gori*, 367 U.S. at 369.

[77] *Arizona*, 434 U.S. at 510 n.28 (emphasis added) (citing *United States v. Gordy*, 526 F.2d 631, 633, 636-637 (5th Cir. 1976) (hectic trial pace to accommodate docket considerations and the judge's expressed concern regarding imminent travel plans)).

sound discretion. In *Arizona*, this Court identified some examples, concluding, "Thus, if a trial judge acts *irrationally* or *irresponsibly*, cf. *United States v. Jorn*, . . . ; see *Illinois v. Somerville*, . . . , his action cannot be condoned."[78] The State trial court here was not acting irrationally or irresponsibly when it declared a mistrial due to a deadlocked jury, nor was the trial court acting for an unrelated reason.

In *United States v. Jorn*, a plurality of this Court concluded that the trial court failed to exercise sound discretion by disbelieving that witnesses had adequately been given their Fifth Amendment warnings, not giving consideration or opportunity for a trial continuance, and then abruptly, sua sponte declaring a mistrial.[79] This Court concluded, "When one examines the circumstances surrounding the discharge of this jury, it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity . . . ."[80] The trial court, under such circumstances, abused its discretion, and whether the defendant benefited from the ruling was not the proper inquiry.[81]

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[78] *Arizona*, 434 U.S. at 514 (emphasis added).

[79] *Jorn*, 400 U.S. at 487.

[80] *Jorn*, 400 U.S. at 487.

[81] *Jorn*, 400 U.S. at 483, 486; *but see Jorn*, 400 U.S. at 492 (*Stewart*, J. joined by White, J., and Blackmun, J., dissenting) ("Whether or not there has been an 'abuse of discretion' sufficient to bar retrial cannot be determined without reference to the purpose and effect of the mistrial ruling. The real question is whether there has been an 'abuse' of the trial process resulting in prejudice to the accused, by way of harassment or the like, such as to outweigh society's interest in the punishment of crime.").

Later, this Court in *Somerville* recognized the limitations of *Jorn's* plurality opinion and counseled against overextending its analysis that the defendant's interests in having his case decided by a single tribunal should necessarily prevail.[82] This Court also noted, "[t]hat [the *Jorn*] opinion dealt with action by a trial judge that can fairly be described as erratic."[83]

This Court's most explicit statement of what does *not* qualify as sound discretion appears in *Arizona*. A trial court is not exercising sound discretion when acting irresponsibly or irrationally. To wit: this is the best working definition of what is *not* sound discretion. Thus, whether a trial court exercised sound discretion is determinative of whether it has abused its discretion.[84]

It has remained true since *Perez* that a trial court's granting of a mistrial due to a deadlocked jury is the paradigm of the proper exercise of sound discretion. It is less apparent and not clearly established as to all of the circumstances that demonstrate sound discretion in reaching the determination that the jury was deadlocked. This is because this Court has expressed that it "abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial."[85] And attempting to

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[82] *Somerville*, 410 U.S., at 469-470.

[83] *Somerville*, 410 U.S., at 469.

[84] *Somerville*, 410 U.S. at 468; *Jorn*, 400 U.S. at 487.

[85] *Somerville*, 410 U.S. at 462.

establish all the scenarios where a trial court could affirmatively exercise sound discretion would be impossible.

However, this Court in *Arizona* concluded that the trial court had exercised sound discretion in handling potential juror bias due to improper comments by defense counsel because the trial court had acted "responsibly and deliberately, and accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding."[86] Likewise, "the trial judge's action was a rational determination designed to implement a legitimate state policy" as in *Somerville*.[87]

In the context of a deadlocked jury, the trial court is in the best situation to make the determination whether the jury is hung and thereby balance the competing interests: i.e., seeking a conviction for those who violate its laws, a defendant's right to have his case decided by a single tribunal, and protecting against a verdict reached by coercive means.[88] If a trial court is confronted with the foreperson's expression of deadlock, the trial court is not acting irresponsibly or irrationally in declaring a mistrial. Further, by the inherent possibility that continued deliberations would render a coerced verdict – especially, as present here, where there was a preceding note indicating potentially acrimonious deliberations – the trial court considered defendant's interests. Therefore, the trial court's decision should not be second-guessed.

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[86] *Arizona*, 434 U.S. at 516.

[87] *Somerville*, 410 U.S. at 469.

[88] *Arizona*, 434 U.S. at 509, 510 n.28.

The breadth of this deference to a trial court's exercise of sound discretion was noted by Justice Rehnquist in the denial of a petition for certiorari in *Winston v. Moore*, another habeas case. Although the case was a denial of certiorari and prior to AEDPA, Justice Rehnquist's dissent properly recognizes the limited nature of review of a trial court's declaration of a mistrial due to a deadlocked jury, especially on habeas review. Justice Rehnquist, writing on behalf of Chief Justice Burger and Justice Stewart stated, "[N]or do I know of a single case from this Court which has ever overturned a trial court's declaration of a mistrial after a jury was unable to reach a verdict on the ground that the 'manifest necessity' standard had not been met."[89]

Here, because the basis for the mistrial was the existence of a deadlocked jury, it involves the classic example of manifest necessity and the exercise of sound discretion. Even applying other indicia of not exercising sound discretion, there is no suggestion that the State trial court declared a mistrial for reasons other than that the jury was deadlocked – the classic example of manifest necessity. The trial court acted deliberately, rationally, and responsibly; its reason was related to the existence of a deadlock. Moreover, in light of the foreperson's expression of the deadlock and the previous note indicating potentially acrimonious deliberations, the trial court gave consideration to the defendant's interests – balancing the right to have his case decided by a single tribunal and the avoidance of a

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[89] *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting).

coerced verdict. The trial court's declaration of a mistrial due to a deadlocked jury must therefore be afforded two layers of deference under AEDPA and the initial deference that should be accorded the trial court's decision on direct review.

B. This Court's precedent has never permitted close scrutiny of a trial court's deadlocked jury determination and no clearly-established precedent mandates that the trial court employ additional methods to ensure that the jury is deadlocked. Rather, the Michigan Supreme Court reasonably applied this Court's precedent.

The Sixth Circuit operated here as though this Court's precedent has established that a reviewing court may second-guess a trial court's declaration of a mistrial due to a deadlocked jury by utilizing a heightened level of scrutiny and by speculating whether additional methods would have resolved the deadlock. The Sixth Circuit's actions are not supported by this Court's clearly-established precedent.

1. This Court has narrowly drawn what constitutes clearly-established precedent.

In the last few years, this Court has reiterated the point that the rule at issue must be one that was specifically established by this Court, and has *narrowly* drawn what is "clearly established" under 28 U.S.C. § 2254(d).

In *Wright v. Van Patten*, this Court examined whether an attorney was presumptively ineffective for participating at his client's plea hearing by speaker phone.[90] The State courts had denied relief, but the United States Court of Appeals for the Seventh Circuit determined this was a structural error under *United States v. Cronic* and granted habeas relief.[91] This Court reversed, in a per curiam opinion, because there was no established Supreme Court precedent on this point, stating, "No decision of this Court, however, squarely addresses the issue in this case . . . ."[92] *Wright* required that there be a "clear[ ] hold[ing"] from this Court on the question at issue.[93]

In *Carey v. Musladin*, another habeas case, this Court examined whether the wearing of buttons by the victim's family during the defendant's trial deprived the defendant of a fair trial.[94] This Court initially noted that it had examined the question about possible error in the conduct of trials based on State-sponsored conduct.[95] However, this Court concluded that spectator conduct was an open question, and lower federal precedent varied on whether error could arise from the conduct of spectators.[96] In light of this divergence, this Court concluded that there was no

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[90] *Wright v. Van Patten*, 552 U.S. 120, 121 (2008).

[91] *Wright*, 552 U.S. at 122 (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

[92] *Wright*, 552 U.S. at 125.

[93] *Wright*, 552 U.S. at 125.

[94] *Carey v. Musladin*, 549 U.S. 70 (2006).

[95] *Carey*, 549 U.S. at 75.

[96] *Carey*, 549 U.S. at 76-77.

clearly-established Supreme Court law for the State court to apply.[97]

This Court again recently reiterated the established principle that Federal courts can only grant habeas relief on the basis of clearly-established law. In *Smith v. Spisak*, the Sixth Circuit granted habeas relief after determining that the State court instructions were unconstitutional.[98] This Court reversed the decision, in part, stating, "[w]e have not, however, previously held jury instructions unconstitutional for this reason." This Court then concluded that "[w]hatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at [Petitioner's] trial were not contrary to 'clearly established Federal law.' 28 U.S.C. § 2254(d)(1)."[99]

On the issue presented here, a dissent by then-Justice Rehnquist in *Winston*, further recognized that this Court had never held that a trial court must employ additional methods, and allowing a court on habeas review to require more would "create[ ] a principle of law that has never been sanctioned by this Court to the effect that a trial judge must interrogate each juror as to the possibility of reaching a verdict before it may declare a mistrial because the jury was 'hung.' "[100]

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[97] *Carey*, 549 U.S. at 77.

[98] *Smith v. Spisak*, 558 U.S. _____; _____ S. Ct. _____; _____ L. Ed. 2d _____; slip op. at 9 (January 12, 2010).

[99] *Smith v. Spisak*, 558 U.S. at _____; slip op. at 9.

[100] *Winston*, 452 U.S. at 946-947 (Rehnquist, J., dissenting).

Creation of new obligations not clearly established in this Court's precedent is improper on habeas review. "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."[101]

No case from this Court has ever clearly established a set amount of time for deliberations. The lack of such an example is consistent with this Court's precedent that there can be no mechanical formula by which to judge the trial court's exercise of sound discretion.[102] Since *Perez* in 1824, this Court has recognized this proposition.[103] Further, this Court has never mandated that additional measures be employed by the trial court to ensure that the jury is deadlocked before declaring a mistrial. In *Arizona*, this Court rejected the Ninth Circuit's application of this principle.[104]

The fact that there is no clearly-established Supreme Court precedent regarding additional methods and set time limits for deliberations is demonstrated by the variation between the circuits in

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[101] *Yarborough*, 541 U.S. at 666.

[102] *Somerville*, 410 U.S. at 462.

[103] *Perez*, 22 U.S. (9 Wheat.) at 580.

[104] *See Arizona*, 434 U.S. at 502, 503 ("The Ninth Circuit . . . affirmed because . . . absent a finding of manifest necessity or an explicit consideration of alternatives, the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict. . . . We are persuaded that the Court of Appeals applied an inappropriate standard of review to the mistrial rulings of this kind . . . .").

examining whether the declaration of a mistrial was proper given the amount of time the jury deliberates.

Some circuits have found comparable deliberation time sufficient to warrant a conclusion that the jury was deadlocked. On direct review in *United States v. Lorenzo*, the Ninth Circuit held that a jury deliberating for three hours was sufficient under *Perez* to warrant a mistrial.[105] Also, in *United States v. Hernandez-Guardado*, the Ninth Circuit concluded that the grant of a mistrial, where the jury deliberated for slightly less than two hours and sent out a jury note expressing a deadlock, and the trial court inquired into the deadlock, did not violate double-jeopardy protections.[106] The Fifth and Eleventh Circuits also denied relief on double jeopardy grounds where the jury had only deliberated for three hours, both habeas cases.[107]

In contrast, other circuits on direct review have found that a comparable amount of time deliberating to be inadequate to justify a finding of manifest necessity. These cases, however, are distinguishable from the facts here.

In *United States v. Gordy*, a Fifth Circuit case, the total jury deliberations were approximately five and one-half hours, the trial court's communications with the jury were inconclusive of a deadlock because

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[105] *United States v. Lorenzo*, 570 F.2d 294, 299 (9th Cir. 1978).

[106] *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1029-1030 (9th Cir. 2000).

[107] *Fay v. McCotter*, 765 F.2d 475, 477 (5th Cir. 1985); *Lindsay v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987).

the jury did not indicate that it was deadlocked but only that it was divided, and there was a hurried atmosphere in the trial that arose from docket considerations and the trial court's imminent travel plans.[108] Also, the jury had previously sent a note requesting clarification on the count on which they were divided, which would indicate potential for further deliberations.[109] Further, in response to defense counsel's objection to declaring a mistrial, the trial court identified reasons that were separate from the existence of a deadlock, stating, "I'm going to discharge this jury. I can make my plane if you will just get off my back long enough for me to do it. I can make my plane if you'll let me."[110] The Fifth Circuit found there was no manifest necessity under *Perez's* "case-by-case standard" given the "totality of the factors."[111]

Also, in *United States ex rel. Webb v. Court of Common Pleas*, without initiation from counsel or the jury, the trial court brought the jury out of deliberations and initiated a colloquy on whether the jury was deadlocked.[112] At the point the trial court sua sponte inquired about the deadlock, the jury had deliberated for six and one-half hours.[113] The Third Circuit determined that the trial court's finding of a deadlock was premature because the trial court directed the inquiry only to the foreperson, raised the

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[108] *United States v. Gordy*, 526 F.2d 631, 633, 634, 636-637 (5th Cir. 1976).

[109] *Gordy*, 526 F.2d at 633.

[110] *Gordy*, 526 F.2d at 634.

[111] *Gordy*, 526 F.2d at 637.

[112] *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1036 (3rd Cir. 1975).

[113] *Webb*, 516 F.2d at 1036.

issue of deadlock sua sponte, and did not consult counsel.[114] The fact of the deadlock here was not triggered by the trial court but by the jury when it sent out a note asking what would happen if it could not reach a verdict.

This variation between how circuits treat comparable lengths of jury deliberations is indicative of the fact-based inquiry in which there can be no mechanical formula that preponderates one way or the other. Further, the circuits have never uniformly applied set additional measures to be employed by trial courts in order for reviewing courts to measure whether the trial court exercised sound discretion.

2. In the absence of any clearly-established, constitutionally-required additional measures or considerations to measure whether the trial court exercised sound discretion, the circuits have recognized a range of guideposts to assist in the inquiry.

Circuits on direct review have developed and applied guideposts, which are not clearly established in this Court's precedent, to aid in the inquiry whether the trial court exercised sound discretion. For example, in *United States v. Charlton*, the First Circuit applied three factors:

- whether the trial court provided counsel an opportunity to be heard;

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[114] *Webb*, 516 F.2d at 1043.

- did the trial court consider alternatives to a mistrial; and
- whether the trial court's decision was made after adequate reflection.[115]

In *United States v. Razmilovic*, the Second Circuit indentified five considerations:

- statements by the jury that it cannot agree;
- length and complexity of the trial;
- amount of time the jury deliberated;
- impact that forced deliberations might have on the verdict; and
- actions taken by the trial court prior to declaring a mistrial to determine that jury was genuinely deadlocked.[116]

The Third Circuit in *United States v. Wecht* considered seven factors:

- a timely objection by the defendant;
- jury's collective opinion that it cannot agree;
- length of jury deliberations;
- length of the trial;
- complexity of the issues presented to the jury;
- any proper communications between the judge and jury; and
- effects of exhaustion and the impact of coercion of further deliberations on the jury.[117]

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[115] *United States v. Charlton*, 502 F.3d 1, 5 (1st Cir. 2007).

[116] *United States v. Razmilovic*, 507 F.3d 130, 137-138 (2nd Cir. 2007).

[117] *United States v. Wecht*, 541 F.3d 493, 506 (3rd Cir. 2008), cert. denied 129 S. Ct. 658 (2008).

While in *United States v. Byrski,* the Seventh Circuit applied five factors:

- jury's expression that it cannot agree;
- length of the trial;
- length of the deliberations;
- complexity of issues; and
- effect of exhaustion and potential for coercion.[118]

This divergence, both in how circuits on direct review assess the length of deliberations and the factors to be used to ascertain whether there was manifest necessity, underscores the fact that there is no clearly-established Supreme Court precedent on these points. The Michigan Supreme could not have unreasonably applied precedent that is not clearly established by this Court.

3. The Michigan Supreme Court reasonably applied this Court's clearly-established precedent when it reviewed the trial court's declaration of a mistrial due to a deadlocked jury.

The Michigan Supreme Court reasonably applied this Court's clearly-established precedent.

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[118] *United States v. Byrski*, 854 F.2d 955, 961 (7th Cir. 1988); *see also Lorenzo*, 570 F.2d at 299 (considering: [1] expression of deadlock by jury, [2] complexity of issues, and [3] length of deliberations); *Hernandez-Guardado*, 228 F.3d at 1029 (considering: [1] jury's collective opinion of deadlock, [2] length of trial and complexity of issues, [3] length of jury deliberations, [4] whether the defendant objected to the declaration of a mistrial, and [5] the effects of exhaustion or coercion on the jury).

Because the trial court has broad discretion in finding manifest necessity due to a deadlocked jury, there is a first layer of deference given that determination. This is even before the limited habeas review, which adds another layer of deference that is required under AEDPA. Here, the Sixth Circuit cut through those two layers of deference to second-guess the State court's determination that the jury was deadlocked.

The Michigan Supreme Court correctly cited and applied the proper general constitutional standard in evaluating the State trial court's action.[119] There was no objection by Lett's trial counsel either when the trial court declared the mistrial or when Lett was retried. Lett was then retried and convicted. The trial court's exercise of its discretion was consistent with *Perez's* principles established 186 years ago.

In reviewing the State trial court's actions, the Michigan Supreme Court engaged in a reasoned application of the record and concluded that the trial court acted within its discretion in finding that the jury was deadlocked and would not be able to reach a verdict.[120] The Michigan Supreme Court noted the length of time the jury deliberated, in light of the limited complexity of the trial:

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[119] *Lett*, 644 N.W.2d at 747-753 (applying *Arizona* and *Richardson*, citing *Perez*); Pet. App. 46a-60a.

[120] *Arizona*, 434 U.S. at 516-517 (If the record is sufficient to justify the declaration of a mistrial, there is no requirement that the trial court clearly explain its ruling.).

> The jury had deliberated for at least four hours following a relatively short, and far from complex, trial.[121]

Next, the Michigan Supreme Court recognized that the jury had sent notes – which can reasonably be construed as indicating open communications between the State trial court and the jury, as well as possibly acrimonious deliberations between the jurors:

> The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated.[122]

The Michigan Supreme Court was well aware of this Court's concern regarding forced deliberations rendering a potential for a coerced verdict.[123]

Finally, the Michigan Supreme Court determined that the jury, through the foreperson, had indicated a deadlock and held that because there was manifest necessity, there was no double-jeopardy bar to Lett's second trial:

> Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict. We conclude that, in the absence of an

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[121] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

[122] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

[123] *Lett*, 644 N.W.2d at 751 (citing *Arizona*, 434 U.S. at 509-510); Pet. App. 54a-55a.

> objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. Accordingly, manifest necessity for the jury's discharge existed, and defendant's retrial did not constitute a constitutionally impermissible successive prosecution.[124]

In other words, the Michigan Supreme Court determined that the record was adequate to explain the basis for the trial court's decision – "[t]he reasons were plain and obvious: the jury foreperson indicated that the jury was not going to be able to reach a unanimous verdict."[125] This decision was supported by the record and was not an unreasonable application of this Court's precedent.

The Sixth Circuit in its habeas review, however, second-guessed the Michigan Supreme Court's determination, and, in doing so, failed to accord the proper deference under AEDPA and failed to recognize that the State trial court is in the best position to determine whether a jury is deadlocked. The Sixth Circuit utilized an unwarranted level of scrutiny and concluded that the State trial court was required to employ additional measures to ensure that the jury was deadlocked.

The Sixth Circuit selectively quoted from this Court's footnote in *Arizona* regarding the dissipation of deference when the trial court does not act with sound

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[124] *Lett*, 644 N.W.2d at 753; Pet. App. 59a-60a.

[125] *Lett*, 644 N.W.2d at 754; Pet. App. 61a

discretion.[126] The Sixth Circuit failed to include the remainder of *Arizona's* footnote 28, regarding deadlocked juries, which states, "*Thus, if the trial court acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.*"[127] Further, the Sixth Circuit quoted language from *Arizona* regarding what constituted "sound discretion" by the trial court in the context of the improper comments made by defense counsel.[128] However, the Sixth Circuit failed to reference this Court's recognition in *Arizona* that it is when a trial court acts "*irrationally*" or "*irresponsibly*" that the mistrial decision cannot stand.[129]

Contrary to the Sixth Circuit's opinion, *Arizona* did not grant license to a habeas court to conduct an open-ended, far-reaching inquiry into sound discretion every time there is a declaration of a mistrial due to a deadlocked jury. Rather, a deadlocked jury is the paradigm of manifest necessity, which warrants the least level of scrutiny and is at the far end of the spectrum.[130]

The Sixth Circuit also overextended this Court's holding in *Arizona*, a case that did not involve a

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[126] *Lett*, 316 F. App'x at 424-425; Pet. App. 8a (quoting, selectively, *Arizona*, 434 U.S. at 510 n.28, 514).

[127] *Arizona*, 434 U.S. at 510 n.28 (emphasis added).

[128] *Lett*, 316 F. App'x at 425; Pet. App. 8a (quoting excised portions of this Court's analysis regarding whether the trial court exercised sound discretion in the face of highly prejudicial comments by defense counsel in *Arizona*, 434 U.S. at 514 n.34, 515-516).

[129] *Arizona*, 434 U.S. at 514 (emphasis added).

[130] *Arizona*, 434 U.S. at 508-509 (footnotes omitted).

deadlocked jury. Specifically, citing to its own "distill[ation]" of *Arizona*, the Sixth Circuit concluded that "three factors [ ] determine whether a judge exercised sound discretion in declaring a mistrial: whether the judge (1) heard the opinion of the parties' counsel about the propriety of the mistrial; (2) considered alternatives to a mistrial; and (3) acted deliberately, instead of abruptly."[131] This Court in *Arizona* did not set these three specific considerations as a constitutional test to determine whether trial courts act soundly within their discretion.[132] Rather, this Court has never required that the trial courts employ or detail alternatives to declaring a mistrial.[133] By requiring the State court to employ measures not mandated by this Court, the Sixth Circuit engaged in a review that this Court said AEDPA forbids.[134]

Here, the Sixth Circuit substituted its own judgment in concluding that the State trial court had acted precipitously and had pressured the foreperson to "acquiesce" to the State trial court's determination of a deadlock.[135] For this reason, over a dissent, the Sixth

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[131] *Lett*, 316 F. App'x at 426, 428; Pet. App. 10a, 14a (citing *Fulton v. Moore*, 520 F.3d 522, 529 (6th Cir. 2008)).

[132] *Arizona*, 434 U.S. at 515-516.

[133] *See Arizona*, 434 U.S. at 502, 503 ("The Ninth Circuit . . . affirmed because . . . absent a finding of manifest necessity or an explicit consideration of alternatives, the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict. . . . We are persuaded that the Court of Appeals applied an inappropriate standard of review to the mistrial rulings of this kind . . . .").

[134] *See Smith v. Spisak*, 558 U.S. at _____; slip op. at 9.

[135] *Lett*, 316 F. App'x at 427; Pet. App. 12a.

Circuit concluded that the Michigan Supreme Court's decision was "objectively unreasonable."[136]

The Sixth Circuit's analysis is wrong. It presupposes that the expression of the deadlock was not in fact a deadlock previously reached. The flaw in the Sixth Circuit's analysis is its failure to afford any credibility to the statement of the foreperson, who said the jury was deadlocked. The Sixth Circuit panel majority fashioned several of its own reasons why the jury was *not really deadlocked* and that the jury may well have reached a verdict if allowed to deliberate longer: (1) jurors would not have had enough time to review the testimony in the amount of time it deliberated, (2) serious nature of the crime and punishment warranted longer deliberations, and (3) juries often initially express deadlock and reach a verdict later.[137] Yet, this is, at best, speculation and provides no basis in fact for these pronouncements. While there might be some instances where time and distance afford greater clarity to events, this is not one of those instances. Here, the Sixth Circuit must necessarily guess at what happened. The Sixth Circuit's assumptions are, in large part, belied by the fact that Lett was convicted on retrial of murder after only three hours and fifteen minutes of deliberations.[138]

The Sixth Circuit engaged in classic second-guessing. Its decision directly contravened two layers of deference – AEDPA and that the State trial court is best suited to make the determination – and is exactly

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[136] *Lett*, 316 F. App'x at 428; Pet. App. 12a.

[137] *Lett*, 316 F. App'x at 427; Pet. App. 13a.

[138] *Lett*, 644 N.W.2d at 746 n.4; Pet. App. 43a.

the type of error Justice Rehnquist identified in *Winston*:

> In my view, the determination of "manifest necessity" is one uniquely vested in the discretion of a trial judge, and particularly should not be subject to attack by a habeas action after trial counsel had failed to object to the declaration of a mistrial.[139]

Justice Rehnquist's observations in *Winston* squarely apply here, even down to counsel's failure to object to the declaration of a mistrial due to a deadlocked jury.

The Sixth Circuit's lack of deference is even more pronounced here given that all State factual determinations are presumed to be correct unless there is a contrary showing by clear and convincing evidence under 28 U.S.C. § 2254(e)(1). In light of the nature of the decision, the State court's determination whether the jury was deadlocked was a factual one entitled to a presumption of correctness. Other federal circuits have noted this very point.[140]

Rather, in light of the broad, general standard applicable at issue, the State court here reasonably applied this Court's precedent. Given the notes sent out by the jury, the record was clear that the initial note on June 13, 1997, indicated raised voices ("a concern about our voice levels"), and that the later note

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[139] *Winston*, 452 U.S. at 947 (Rehnquist, J., dissenting).

[140] *See, e.g., Weaver v. Thompson*, 197 F.3d 359, 363 n.6 (9th Cir. 1999); *Green v. Johnson*, 160 F.3d 1029, 1046 (5th Cir. 1998).

plainly supports the jury foreperson's statement that the jury was unable to agree on a verdict. Under these circumstances, justice would not be served by forcing the jury to reach a verdict out of duress. Like *Somerville*, the trial court was rational and responsible, seeking a just judgment for both Lett and the State. There is nothing in the record to suggest that the State trial court here acted for reasons unrelated to the expression of a deadlock. As in *Sanford* and *Richardson*, the principles set forth over a century and a half before in *Perez* recognize the trial court's discretion – discretion that is "accorded great deference" and "special respect."[141] The dissenting judge in the Sixth Circuit correctly recognized this discretion and that this Court's precedent has not mandated as a constitutional requirement that a trial court engage in additional steps before reaching a decision that there is manifest necessity to declare a mistrial based on a jury's deadlock.[142]

If the trial court's discretion is wrested away on post hoc habeas review, the State is left with an untenable situation when confronted with a jury's expression of deadlock. That is, either: (1) force continued deliberations for an unspecified amount of time and implement unspecified additional measures

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[141] *Arizona*, 434 U.S. at 510.

[142] "A trial judge is in a far superior position to determine whether a jury is genuinely deadlocked and whether it is beneficial to the interest of justice to send the jury for further deliberations.... [N]o Supreme Court holdings require specific findings on the record by a trial court and no Supreme Court holdings require proof that specific actions have been considered or taken prior to declaring mistrial due to a deadlocked jury." *Lett*, 316 F. App'x at 429; Pet. App. 16a.-17a. (Forester, J., dissenting).

without knowing when enough is enough thereby risking a coerced verdict or (2) declare that there is manifest necessity, which might then be open to far-reaching second-guessing on habeas review. Here, the State trial court exercised sound discretion and acted reasonably and responsibly within its broad discretion when it granted a mistrial. The Michigan Supreme Court reasonably applied this Court's existing general, broad standard in determining that a second trial was not barred by double-jeopardy protections. The Sixth Circuit erred by disregarding the State court's factual findings and second-guessing the Michigan Supreme Court's legal determination.

CONCLUSION

The State of Michigan respectfully requests the judgment of the Sixth Circuit be reversed.

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IN THE
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PAUL RENICO, WARDEN,
Petitioner,

v.

REGINALD LETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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193

46

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THE SIXTH CIRCUIT CORRECTLY HELD THAT MR. LETT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED AND THAT THE STATE COURT UNREASONABLY APPLIED THIS COURT'S ESTABLISHED PRECEDENT	8
A. Mr. Lett's Double Jeopardy Rights Were Violated Because There Was No "Manifest Necessity" Justifying the Declaration of a Mistrial	8
B. Mr. Lett Was Properly Granted Habeas Relief Under 28 U.S.C. § 2254(d)(1), As the State Court Unreasonably Applied this Court's Double Jeopardy and "Manifest Necessity" Precedent	19
CONCLUSION	41

TABLE OF AUTHORITIES

CASES Page

Arizona v. *Washington*, 434 U.S. 497 (1978) ..... *passim*
Benton v. *Maryland*, 395 U.S. 784 (1969) 9
Carey v. *Musladin*, 549 U.S. 70 (2006) 33
Copeland v. *Washington*, 232 F.3d 969 (8th Cir. 2000) 23
Crist v. *Bretz*, 437 U.S. 28 (1978) 9
Downum v. *United States*, 372 U.S. 734 (1963) 11
Fulton v. *Moore*, 520 F.3d 522 (6th Cir. 2008) 32
Fay v. *McCotter*, 765 F.2d 475, 476-78 (5th Cir. 1985) 28
Gilliam v. *Foster*, 75 F.3d 881 (4th Cir. 1996) 31, 35
Grandberry v. *Bonner*, 653 F.2d 1010 (5th Cir. 1981) 32
Illinois v. *Somerville*, 410 U.S. 458 (1973) ..... *passim*
Jones v. *Hogg*, 732 F.2d 53 (6th Cir. 1984) 32, 34, 35
Lajoie v. *Thompson*, 217 F.3d 663 (9th Cir. 2000) 23
Lockyer v. *Andrade*, 538 U.S. 63 (2003) 19, 20, 22, 23
Oregon v. *Kennedy*, 456 U.S. 667 (1982) 9
People v. *Carines*, 597 N.W.2d 130 (Mich. 1999) 37
People v. *Lett*, 463 Mich. 939, 620 N.W.2d 855 (2000) 3, 4, 19
People v. *Lugo*, 542 N.W.2d 921 (Mich. Ct. App. 1995) 37

TABLE OF AUTHORITIES—continued

	Page
People v. *Matuszak*, 687 N.W. 2d 342 (Mich. Ct. App. 2004)	38
Phoenix v. *Matesanz*, 233 F.3d 77 (1st Cir. 2000)	23
Price v. *Georgia*, 398 U.S. 323 (1970)	19
Quinn v. *Haynes*, 234 F.3d 837 (4th Cir. 2000)	22
Rice v. *Collins*, 546 U.S. 333 (2006)	36
Robinson v. *Polk*, 444 F.3d 225 (4th Cir. 2006)	22
United States ex rel. Webb v. *Ct. of Common Pleas*, 516 F.2d 1034 (3d Cir. 1975)	28
United States v. *Berroa*, 374 F.3d 1053 (11th Cir. 2004)	35
United States v. *Byrski*, 854 F.2d 955 (7th Cir. 1988)	29, 30, 34
United States v. *Chapman*, 524 F.3d 1073 (9th Cir. 2008)	32, 35
United States v. *Charlton*, 502 F.3d 1 (1st Cir. 2007)	29, 35
United States v. *Gordy*, 526 F.2d 631 (5th Cir. 1976)	28, 32
United States v. *Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000)	28, 32, 34
United States v. *Horn*, 583 F.2d 1124 (10th Cir. 1978)	32, 34, 35
United States v. *Jorn*, 400 U.S. 470 (1971)	*passim*
United States v. *Lorenzo*, 570 F.2d 294 (9th Cir. 1987)	27
United States v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824)	*passim*
United States v. *Razmilovic*, 507 F.3d 130 (2d Cir. 2007)	29, 30, 34, 35

TABLE OF AUTHORITIES—continued

Page

United States v. *Shafer*, 987 F.2d 1054 (4th Cir. 1993) 31
United States v. *Sloan*, 36 F.3d 386 (4th Cir. 1994) 31, 33
United States v. *Starling*, 571 F.2d 934 (5th Cir. 1978) 32
United States v. *Wecht*, 541 F.3d 493 (3d Cir. 2008) 29, 30, 34, 35, 36
Wade v. *Hunter*, 336 U.S. 684 (1949) 9
Williams v. *Taylor*, 529 U.S. 362 (2000) 20, 23
Winston v. *Moore*, 452 U.S. 944 (1981) 31
Wood v. *Allen*, No. 08-9156, 2010 WL 173369 (U.S. Jan. 20, 2010) 36
Yarborough v. *Alvarado*, 541 U.S. 652 (2004) 19

CONSTITUTION AND STATUTE

U.S. Const. amend. V 8
28 U.S.C. § 2254 ..... *passim*

RULES

Sup. Ct. R. 14.1(a) 36
Fed. R. Crim. P. 26.3 35

STATEMENT OF THE CASE

Reginald Lett was charged with first degree murder and using a firearm during the commission of a felony for the August 29, 1996 death of Adesoji Latona in Detroit, Michigan. See generally Pet. App. 19a. A jury trial began on June 3, 1997 and was conducted intermittently on June 5, 10, 11, 12 and 13, 1997. *Id.* at 20a. Jury deliberations began at 3:24 p.m. on June 12, 1997, and the jury was excused for the day at approximately 4:00 p.m. *Id.* Deliberations resumed on Friday June 13th at an unknown time, presumably in the morning. *Id.* After approximately four hours of deliberation, the jury sent out a note that asked "What if we can't agree? Mistrial? Retrial? What?" Pet. App. 41a. Then the following exchange occurred upon the jury's return to the courtroom at 12:45 p.m.:

> THE COURT: You may be seated. Is the jury present and properly seated, counsel?
>
> MR. HEAPHY [the assistant prosecutor]: Yes, your Honor.
>
> MR. GORDON [defense counsel]: Yes, Judge.
>
> THE COURT: I received your note asking me what if you can't agree? And I have to conclude from that that that is your situation at this time. So, I'd like to ask the foreperson to identify themselves, please?
>
> THE FOREPERSON: My name is Janice Bowden.
>
> THE COURT: Okay, thank you. All right. I need to ask you if the jury is deadlocked; in other words, is there a disagreement as to the verdict?
>
> THE FOREPERSON: Yes, there is.

THE COURT: All right. Do you believe that it is hopelessly deadlocked?

THE FOREPERSON: The majority of us don't believe that–

THE COURT: (Interposing) Don't say what you're going to say, okay?

THE FOREPERSON: Oh, I'm sorry.

THE COURT: I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict or not?

THE FOREPERSON: (No response)

THE COURT: Yes or no?

THE FOREPERSON: No, Judge.

THE COURT: All right. I hereby declare a mistrial. The jury is dismissed.

(At about 12:48 p.m.—jury discharged)

Pet. App. 93a-94a. Mr. Lett's trial attorney did not object to the declaration of a mistrial.

Upon retrial before a different judge, Mr. Lett was convicted of felony firearm and the lesser offense of second degree murder. Pet. App. 22a.

Mr. Lett successfully appealed his convictions to the Michigan Court of Appeals. Pet. App. 68a-75a. The state Court of Appeals found that Mr. Lett did not consent to the discharge of the first jury and that the trial court abused its discretion in concluding that the jury was deadlocked. Pet. App. 72a-74a. Therefore, there was no manifest necessity for the trial court's *sua sponte* declaration of a mistrial. Pet. App. 74a-75a. The Court of Appeals held that the second

trial violated double jeopardy under the plain error standard of review. Pet. App. 72a, 75a.

The Wayne County Prosecutor filed an application for leave to appeal that decision to the Michigan Supreme Court. While that application was pending, Mr. Lett, through counsel, filed a trial court motion to enforce the Michigan Court of Appeals' decision, and sought release pending the prosecutor's application for leave to appeal. District Court R.22, Post-Conviction Hearing of July 7, 2000, 6th Cir. Joint Apx. Pgs. 152-153. At the hearing on that motion, the likelihood of the Michigan Supreme Court granting leave to appeal was discussed (among other points) whereupon the prosecutor acknowledged that the trial court erred in declaring a mistrial:

> MS. NAPP [local assistant prosecutor]: "[ ]I will say—I will acknowledge on the record that Judge Brown should not have dismissed the jury.
>
> THE COURT: Absolutely.
>
> MS. NAPP: That clearly—
>
> THE COURT: I think we all—
>
> MS. NAPP: —*that clearly was error* [ ]."

District Court R.22, Post-Conviction Hearing of July 7, 2000 at pages 21-22, 6th Cir. Joint Apx. Pgs. 152-153 (emphasis added).

The Michigan Supreme Court granted leave to appeal. *People* v. *Lett*, 463 Mich. 939, 620 N.W.2d 855 (2000) (Table). In that Order, the Michigan Supreme Court specifically declined to accept the prosecutor's concession of error, "because this Court is not required to accept the prosecutor's concession concerning the constitutional nature of any error that occurred in this case . . .," and directed the parties to

answer a series of questions including whether Mr. Lett "forfeited" the error or "implicitly consent[ed]" by failing to object to the declaration of the mistrial. *Id.* The Michigan Supreme Court also asked the parties to address, among other points, "the appropriate remedy where a trial court's declaration of mistrial occurs within the context of a record that is inadequate regarding whether manifest necessity existed [and] whether the inadequacy of a record regarding whether manifest necessity existed is the equivalent of an absence of manifest necessity[ ]." *Id.*

After briefing and oral arguments, the Michigan Supreme Court reversed the decision of the Michigan Court of Appeals, concluding the trial court correctly declared a mistrial where manifest necessity existed.[1] Pet. App. 39a-67a. Given this "manifest necessity," the state Supreme Court determined, over dissent of two Justices, that the trial judge exercised sound discretion in declaring a mistrial such that Mr. Lett's retrial did not violate his Fifth Amendment double jeopardy rights.[2] Pet. App. 59a-60a.

Mr. Lett filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan, which was granted by District Judge David M. Lawson on August 31, 2007, in a published opinion. Pet. App. 18a-38a. The District

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[1] The Michigan Supreme Court did not specifically address the forfeiture aspect of the claim in its opinion, and elected to "save for another day" the issue of implied consent. Pet. App. 58a-59a.

[2] The Michigan Supreme Court's Order thereafter directed the Michigan Court of Appeals to address the remaining issues on appeal, which are not relevant to these proceedings. The Michigan Court of Appeals and Michigan Supreme Court denied relief on those claims.

Court ruled that the state trial judge did not exercise sound discretion because no manifest necessity existed to declare a mistrial, and that the Michigan Supreme Court's decision otherwise was an unreasonable application of the United States Supreme Court's precedent set forth in *Arizona* v. *Washington*, 434 U.S. 497 (1978). Pet. App. 37a.

The State of Michigan appealed that decision to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the decision to grant the habeas petition in an unpublished opinion. Pet. App. 1a-17a. Like the District Court, the Sixth Circuit held that the trial court did not exercise "sound discretion" in declaring a mistrial, and the Michigan Supreme Court's decision otherwise was an unreasonable application of this Court's precedent. Pet. App. 11a-15a. *En banc* rehearing was unanimously denied. Pet. App. 76a.

Warden Renico, through the State of Michigan Attorney General's Office, petitioned for certiorari to this Court on the following issue:

> Whether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict.

This Court granted certiorari on November 30, 2009.

SUMMARY OF ARGUMENT

Reginald Lett's habeas petition was properly granted. The Michigan Supreme Court unreasonably applied this Court's clearly established precedent in holding that the Fifth Amendment's Double Jeopardy Clause did not bar Mr. Lett's retrial. As the local prosecutor conceded after the initial appeal, the trial judge should not have declared a mistrial and discharged the jury at 12:48 p.m. on June 13, 1997. There was no "manifest necessity" to declare a mistrial at that point where the jurors had not deliberated for very long, the charges involved first degree murder, and the jury had merely asked what would happen *if* they could not agree. See Pet. App. 93a. The trial court acted so hastily that there was no opportunity to object before the mistrial was declared.

Although deference is owed to both a trial judge in declaring a mistrial based on juror deadlock and to a state court on habeas corpus review, review is nonetheless required. State appellate courts have an obligation to assure themselves that the trial court exercised sound discretion, both in determining that the jury was genuinely deadlocked *and* that there was a high degree of necessity for a mistrial. Federal courts on habeas review must examine whether the state appellate courts reasonably applied this Court's precedent in assessing sound discretion and manifest necessity. This Court has established these requirements in the cases of *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), *United States* v. *Jorn*, 400 U.S. 470 (1971) and *Arizona* v. *Washington*, 434 U.S. 497 (1978). Paying heed to the required deference, the Sixth Circuit applied this Court's precedent to determine that the Michigan Supreme

Court's ruling was unreasonable under 28 U.S.C. § 2254(d)(1).

These precedents establish a clear rule that, while accommodating of a variety of circumstances, nonetheless requires that the trial court determine that a "manifest" or "high degree" of necessity justifies a mistrial based upon juror deadlock to avoid the double jeopardy bar against retrial. Trial courts are to exercise "sound discretion" in determining that such "manifest necessity" exists, which requires taking "all circumstances into consideration" and applying a strong presumption against terminating trial short of a verdict. Even though no mechanical formulation or steps are specified, a trial judge confronted with a possible juror deadlock must treat the declaration of a mistrial as a near-last resort. Where, as here, the foreperson's statements do not establish that the jury is hopelessly deadlocked, consideration of alternatives to the declaration of a mistrial and consultation with counsel for the parties are highly relevant to whether sound discretion was exercised.

The fact this Court has not mandated precise steps for using sound discretion or spelled out specific factors establishing manifest necessity by no means diminishes the mandates of *Perez, Jorn and Washington*. For example, federal circuits reviewing mistrial rulings have displayed remarkable coherence and consistency in applying this precedent, and have identified substantially similar factors to guide their sound discretion inquiries. Such coherence is relevant to assess the reasonableness of the state appellate court decision on habeas review. And a survey of the various consistent factors identified by the circuit courts supports the conclusion that the Michigan Supreme Court fell below an objective

standard of reasonableness in applying this Court's precedent.

ARGUMENT

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT MR. LETT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS VIOLATED AND THAT THE STATE COURT UNREASONABLY APPLIED THIS COURT'S ESTABLISHED PRECEDENT.

Habeas relief was granted in both the District and Circuit Courts because the Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was based on an unreasonable application of this Court's decisions in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579 (1824), *United States* v. *Jorn*, 400 U.S. 470 (1971) and *Arizona* v. *Washington*, 434 U.S. 497 (1978). The Michigan Supreme Court held that the trial court exercised "sound discretion" in discharging the jury, despite any record support that discretion was soundly exercised or that there was the required manifest necessity for a mistrial. Both the Federal District Court and the Sixth Circuit held that there was no evidence that the trial court exercised "sound discretion" required by *Perez*, *Jorn* and *Washington*.

A. Mr. Lett's Double Jeopardy Rights Were Violated Because There Was No "Manifest Necessity" Justifying the Declaration of a Mistrial.

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . ." This provision was made applicable to the states through the Fourteenth Amendment.

Benton v. *Maryland*, 395 U.S. 784 (1969). Jeopardy attaches once a jury is empanelled and sworn. *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978) (citing *Downum* v. *United States*, 372 U.S. 734 (1963)). A defendant has a "valued right" to have his case tried by the original jury. *Jorn*, 400 U.S. at 480 (quoting *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949)). This right is so valuable because multiple trials can be "grossly unfair" by increasing "the financial and emotional burden" on the defendant and "prolong[ing] the period in which he is stigmatized" by having charges pending against him. *Washington*, 434 U.S. at 503-04 (internal citations omitted). Multiple trials "may even enhance the risk that an innocent defendant may be convicted." *Id.* at 504.

But this "valued right" must sometimes yield to the public's "interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949). In other words, there may be "manifest necessity" to declare a mistrial and dismiss the jury short of a verdict for a variety of reasons, including juror misconduct or errors by witnesses or parties that may prejudice the jury. Here, a mistrial was ultimately declared after the jury inquired about the consequences of failing to agree on a verdict. A deadlocked jury is regarded as the "prototypical example" of manifest necessity. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982) (citing *Washington*, 434 U.S. at 509).

Petitioner points out that jeopardy is not implicated where a mistrial is premised on "manifest necessity," and that a deadlocked jury is one instance presenting such a manifest necessity. Pet. Br. 19-24. This is true, but begs the question of whether Mr. Lett's jury was "genuinely deadlocked" to invoke the manifest necessity of retrial. *Washington*, 434 U.S. at 509.

Here, the trial court did not exercise the constitutionally required "sound discretion" in declaring a mistrial. Therefore, Mr. Lett's retrial was barred by the Double Jeopardy Clause.

1. A trial court must exercise "sound discretion" in finding that "manifest necessity" exists to declare a mistrial.

Because of the importance of a defendant's valued right to have his trial heard by the original jury and the fact that the right is frustrated by any mistrial declaration, there must be "manifest necessity" to declare a mistrial. The term "manifest necessity" was first used in *Perez*, 22 U.S. (9 Wheat.) at 580 to define a situation involving "urgent circumstances":

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. *They are to exercise a sound discretion on the subject*; and it is impossible to define all the circumstances, which would render it proper to interfere. *To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . . .*

Id. (emphasis added).

As this Court explained, "manifest necessity" means a "high degree" of necessity: "we assume that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Washington*, 434 U.S. at 506. "The

discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances.'" *Downum* v. *United States*, 372 U.S. 734, 736 (1963) (quoting Mr. Justice Story's words in *United States* v. *Coolidge*, 25 Fed. Cas. 622, 633 (1815)).

Trial courts must exercise "sound discretion" in determining whether manifest necessity requiring a mistrial exists. *Perez*, 22 U.S. (9 Wheat.) at 580; *Washington*, 434 U.S. at 514. In light of the "varying and often unique situations arising during the course of a criminal trial," this Court has rejected a "mechanical" approach or bright line rule for interpreting and applying the phrase "sound discretion." *Illinois* v. *Somerville*, 410 U.S. 458, 462 (1973). But *Perez's* directive that "all the circumstances" be considered and mistrial declarations be treated with the "greatest caution" serves "as a command to trial judges" not to declare a mistrial "until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings." *Jorn*, 400 U.S. at 485.

The precipitous mistrial declaration in this case did not satisfy *Perez*'s directive. In *Washington*, 434 U.S. at 515-16, this Court described the "sound discretion" exercised by a trial court faced with a mistrial request based on prejudicial statements made by defense counsel in opening statement as evidencing careful and deliberate action:

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain

> their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding."

Id. Thus, careful, deliberate action is the type of "sound discretion" that is required before declaring a mistrial. Any decision to declare a mistrial is not to be taken lightly. *Somerville*, 410 U.S. at 471. As the Sixth Circuit in this case recognized, "[t]hat a mistrial may not be declared without caution, deliberation, and a consideration of the defendant's Fifth Amendment rights is clear from *Perez*, *Jorn*, and *Washington*." Pet. App. 9a. By contrast, this Court in *Somerville* described the trial court's action in *Jorn*, as "erratic." *Somerville*, 410 U.S. at 469; see also *Washington*, 434 U.S. at 514 (citing *Jorn* for the proposition that a trial court's action can not be condoned "if a trial judge acts irrationally or irresponsibly").

This Court has indicated that the mere existence of possible alternatives to the declaration of a mistrial does not in itself belie a finding of sound discretion. See, *e.g.*, *Washington*, 434 U.S. at 511. But the trial judge "'must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate.'" *Id.* at 514 (quoting *Jorn*, 400 U.S. at 486). This, combined with the requirement that "all circumstances" be considered reveals that alternatives short of a mistrial are important to the equation and should be considered in determining whether manifest necessity existed. See *Jorn*, 400

U.S. at 487 (holding that trial court made no effort to exercise sound discretion in abruptly declaring a mistrial based on the failure to advise several witnesses of their Fifth Amendment rights where the court did not solicit input from counsel or consider alternatives to a mistrial such as granting a trial continuance); see also *Somerville*, 410 U.S. at 481 ("Once it is shown that alternatives to the declaration of a mistrial existed, as they did here, we must consider whether the reasons which led to the declaration were sufficient, in light of those alternatives, to overcome the defendant's interest in trying the case to the jury." (Marshall, J., dissenting)). In other words, "sound discretion" requires that a mistrial to be treated as something closer to a last resort rather than as the first or only consideration by the trial judge.

While it is true that trial courts are afforded great deference because they are in the best position to assess the status of the jury, *Washington*, 434 U.S. at 509-10,[3] reviewing courts have an "obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.* at 514. To that end, it is readily apparent that it is not proper to declare a mistrial simply when the trial court surmises that the jury *might* be deadlocked. *Washington* spoke in terms of the jury being "genuinely deadlocked" in order to find that the trial court exercised sound discretion to declare a mistrial. *Id.* at 509. Moreover the record must actually support that the trial court exercised "sound

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[3] This deference is also rooted in a legitimate concern that too much appellate second guessing might lead trial courts to use coercive means to break apparent jury deadlocks, thereby forcing unjust and unsound verdicts. *Washington*, 434 U.S. at 509-10.

discretion" in order for a reviewing court to afford wide latitude in declaring a mistrial:

> If the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference by an appellate court disappears. Thus, if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling, close appellate scrutiny is appropriate.

Id. at 510 n.28 (internal citations omitted).

There is no evidence that the trial court in this case declared a mistrial for pretextual reasons. However, heightened deference to a mistrial declaration is equally inappropriate where there was neither record support nor any finding of manifest necessity, i.e., where it does not appear, "taking all the circumstances into consideration" *Perez*, 22 U.S. (9 Wheat.) at 580, that the jury was "genuinely deadlocked." *Washington*, 434 U.S. at 509.

As three out of the four courts to review this case have held, and as the local prosecutor conceded in the trial court below, the trial judge here did not exercise sound discretion, and manifest necessity did not justify the declaration of a mistrial in this case.

2. Where the trial court did not exercise "sound discretion" in declaring a mistrial, the Michigan Supreme Court incorrectly held that Mr. Lett's double jeopardy rights were not violated.

The problem with the Michigan Supreme Court decision lies with the application of these principles to the ultimate conclusion that the trial court

exercised "sound discretion" in this case. Fundamentally, the Michigan Supreme Court failed to appreciate that discretion is an *exercise;* one requiring analysis of "all circumstances." *Perez,* 22 U.S. (9 Wheat.) at 580. Here, the trial court called the parties and the jurors into the courtroom upon receiving a note that asked "what if" the jury could not agree. Pet. App. 93a. Nothing in the record indicated that the parties had any idea what the note said before it was read in open court at approximately 12:45 p.m. See, *e.g.*, Pet. App. 43a. This was the first record-based exchange with the jury since it began deliberating.[4] Three *minutes* after this question was read in court, the jury was discharged. Pet. App. 94a (discharging the jury at 12:48 p.m.).

One is hard pressed to imagine a trial judge doing less to protect the defendant's "valued right" to have this first jury reach a verdict in his case. But it was essentially upon this three minute exchange that the state Supreme Court found "sound discretion." Absent any clue from the trial court as to what it was thinking beyond its brief exchange, the Michigan Supreme Court backfilled this hole by pointing out that, (1) the jury "deliberated for at least four hours following a relatively short, and far from complex, trial," (2) the jury sent out several notes "including one that appears to indicate that its discussions may

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[4] The Michigan Supreme Court noted that the jury sent out a total of "seven notes," the majority of which "were routine requests for evidence, instructions and breaks." None of these notes are in the record materials. Pet. App. 20a; *id.* at 2a. The Michigan Supreme Court placed emphasis on one such note in which the jurors purportedly expressed "'a concern about our voice levels disturbing any other proceedings that might be going on,' indicating that perhaps the deliberations had already become somewhat acrimonious." Pet. App. 42a-43a.

have been particularly heated"[5] and (3) the "foreperson expressly stated that the jury was not going to reach a verdict." Pet. App. 59a.

In this case, the trial court "[ ]made no findings, provided no reasoning, articulated no justification, and entertained no argument from counsel" requiring the reviewing court to "look to other objective clues in the record to determine whether the trial court exercised discretion in declaring a mistrial and to assess the soundness of the choice." Pet. App. 32a. None of the State Supreme Court's conclusions are supported by an objective review of the record. This was a first degree murder case and was quite complex, particularly viewed from Mr. Lett's perspective, given that his life and freedom were at stake. The trial judge thought so little of the "notes" that they were not preserved as part of the record, see Pet. App. 20a; *id.* at 2a, and therefore can not carry the weight the Michigan Supreme Court assigned them. Most importantly, the jury as a whole never said that they were hopelessly deadlocked. They asked for more information, which necessarily implied that an answer to their question would impact further deliberations. Without more information or any further instruction, the trial court demanded that the foreperson (and only the foreperson) state "yes" or "no" whether the jury would reach a unanimous verdict. Pet. App. 93a-94a. The Michigan Supreme Court characterized this as "sound discretion." In so doing, the court rendered the "manifest necessity" requirement superfluous. For if manifest necessity can be found "on the most

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[5] As set forth in n.4, *supra*, none of the notes are contained in the record, save for the transcript reference asking "what if" the jury could not agree.

meager record," Pet. App. 66a (Cavanagh, J., dissenting), then there is no point to even undertake any inquiry—a reviewing court need only affix its rubber stamp.

More is required. The trial court must exercise sound discretion in determining whether the jury is genuinely deadlocked. The record must confirm manifest necessity. The power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Perez*, 22 U.S. (9 Wheat.) at 580. Judges "should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner." *Id.* This Court assumes trial courts would undertake that discretion, but has made clear that when judges act "irrationally or irresponsibly" their actions will not survive scrutiny. *Washington*, 434 U.S. at 514 (citing *Jorn*, 400 U.S. at 486). A reviewing court like the Michigan Supreme Court has an "obligation to satisfy" itself that sound discretion was exercised. *Id.* Instead, the Michigan Supreme Court simply provided its own speculation in an attempt to supplement a record that the trial court failed to make. See Pet. App. 37a.

The trial court acted irrationally and irresponsibly without any regard for Mr. Lett's valued right to have his first jury reach a verdict. There was no "high degree of necessity" for a mistrial where the jury had simply asked "what if" they could not agree three minutes before being discharged. The trial court's assertion of "deadlock" based on the jury's written question was presumptuous. See Pet. App. 11a ("The note—'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'—was not a statement that the jury was hopelessly deadlocked, or even deadlocked at all. The note was asking the judge for more

information. . . . "). The foreperson's answer to the court's question about "unanimous verdict" was ambiguous in context. The judge jumped right to a mistrial declaration without considering any alternatives short of that, such as answering the jury's question, asking whether the foreperson thought further deliberations would be productive, asking whether the other jurors agreed with the foreperson's answer, or giving a deadlocked jury instruction. The judge did not bother consulting with counsel. The only thing apparent from this record is that a mistrial was the first and only consideration for the trial judge, instead of something closer to the last alternative. Declaring a mistrial on a "hunch"[6] that the jury was deadlocked defies the mandate set forth in *Perez* and *Arizona* v. *Washington* that a mistrial be manifestly necessary. As such, Mr. Lett's retrial violated double jeopardy.

The unsoundness of the Michigan Supreme Court's decision to reinstate Mr. Lett's conviction is highlighted by the manner with which the claim reached and was presented to that Court in the first place. After Mr. Lett's first successful appeal, the prosecutor stated "for the record," that the trial court "should not have dismissed the jury" and that it was "clearly error" for the trial court to do so. District Court R.22, Post Conviction Motion Hearing of July 7, 2000, at 21-22; 6th Cir. Joint Apx. Pgs. 152-153. That concession was repeated in the prosecutor's leave application to the Michigan Supreme Court, which phrased the issue presented as whether the trial court's "inadvertent error" in declaring a mistrial barred retrial because the error was not

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[6] As described by Justice Cavanagh in his dissent in *People* v. *Lett*. Pet. App. 66a-67a.

"plain" and because Mr. Lett did not suffer "sufficient prejudice" from that "inadvertent error." District Court R.26. The prosecutor asked the court to grant review in part "to determine the degree of prejudice that a defendant must suffer to justify a reversal on a forfeited double jeopardy claim." *Id.*[7]

Despite these concessions, the Michigan Supreme Court granted leave to appeal, noting that "this Court is not required to accept the prosecutor's concession concerning the constitutional nature of any error that occurred in this case. . . ." *Lett*, 463 Mich. 939. The Michigan Supreme Court went on to find no error at all in the trial court's ruling. This dubious history combined with the state Supreme Court's flawed analysis reveals a clear attempt merely to rubber stamp the mistrial declaration and save Mr. Lett's convictions.

B. Mr. Lett Was Properly Granted Habeas Relief Under 28 U.S.C. § 2254(d)(1), As the State Court Unreasonably Applied this Court's Double Jeopardy and "Manifest Necessity" Precedent.

Under 28 U.S.C. § 2254(d)(1), a court may grant the writ of habeas corpus where a state court judgment "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." To determine what constitutes "clearly established" law, courts look to the law established by Supreme Court holdings. *Yarborough* v. *Alvarado*, 541 U.S. 652, 660-61 (2004); *Lockyer* v. *Andrade*, 538

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[7] *But see Price* v. *Georgia*, 398 U.S. 323, 331 (1970) (explaining that double jeopardy claims are not amenable to harmless error analysis).

U.S. 63, 71 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., concurring in part).

As a threshold matter, Mr. Lett sought habeas relief claiming that the Michigan Supreme Court's decision was an unreasonable application of this Court's decision in *Washington, supra*, which also encompasses earlier precedent including *Jorn, supra*, and *Perez, supra*. Part of Petitioner's argument is that this Court's precedent has never required any specific "additional" measures to be undertaken by a trial court to determine that a manifest necessity exists prior to declaring a mistrial, and therefore the decision to grant habeas corpus relief by the District Court and Sixth Circuit was not based on "clearly established" precedent. See, *e.g.*, Pet. Br. 35-43. Contrary to this contention, neither Mr. Lett nor the Sixth Circuit have demanded specific "additional" steps be taken beyond what the constitution and this Court's precedent require. Rather, the "steps" taken by the trial court to ensure juror deadlock were so insufficient, and the record so devoid of facts establishing manifest necessity, that the Michigan Supreme Court unreasonably applied this Court's precedent in reinstating Mr. Lett's conviction.

1. The law guiding decisions on what constitutes "sound discretion" and "manifest necessity" to declare a mistrial is clearly established by this Court's precedent.

Where a trial court exercises "sound discretion" in determining that the jury is genuinely deadlocked and therefore there is manifest necessity for a mistrial, that decision is entitled to great deference. Petitioner claims that the law is "not clearly established as to all of the circumstances that demonstrate sound discretion in reaching the

determination that the jury was deadlocked." Pet. Br. 32. This Court has never explicitly defined what would constitute "sound discretion" or that specific steps must be taken prior to declaring a mistrial. See *Somerville*, 410 U.S. at 462 (rejecting a "mechanical" approach to sound discretion). *Perez* explains that "it is impossible to define all the circumstances" that the trial court must consider. 22 U.S. (9 Wheat.) at 580. In fact, this Court has "explicitly declined . . . to formulate rules based on categories of circumstances which will permit or preclude retrial." *Jorn*, 400 U.S. at 480. This "conscious refusal" to create "rules based on categories of circumstances . . . reflects the elusive nature of the problem presented by judicial action foreclosing the defendant from going to his jury." *Id.* at 485.

Washington describes the considerations of the trial judge that range between the risk of discharging the jury too quickly when it may be able to reach a verdict versus the risk of coercing a jury to agree on a verdict even though it has not done so "after protracted and exhausting deliberations." 434 U.S. at 509. This comports with *Perez*'s mandate that the trial court "tak[e] all the circumstances into consideration" prior to declaring a mistrial. *Jorn* further explains that "the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal." *Jorn*, 400 U.S. at 486. In *Washington*, double jeopardy did not preclude retrial where the record reflected that the trial judge exercised sound discretion: "the trial judge acted responsibly and deliberately, and accorded careful consideration to [the defendant's] interest in having the trial concluded in a single proceeding." 434 U.S. at 516.

Read together, *Perez*, *Jorn*, and *Washington* make it clear that "sound discretion" means that the trial court consider all of the circumstances, and make a ruling that is thoughtful and deliberative, and not act "irrationally," "irresponsibly," or "precipitately." *Washington*, 434 U.S. at 514-15. *Washington*, *Jorn* and *Perez* clearly establish the law in this regard, and Mr. Lett makes no claim that any specific act beyond exercising "sound discretion" is required.

"Section 2254(d)(1) permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." *Lockyer*, 538 U.S. at 76. The term "holding" for purposes of § 2254(d)(1) is not limited to mechanical steps and narrow statements but instead refers to "the governing legal principle or principles set forth by the Supreme Court" designed to apply to a range of factual contexts. *Id.* at 71. "[T]he relevant Supreme Court precedent need not be directly on point, but must provide a 'governing legal principle' and articulate specific considerations for the lower courts to follow when applying the precedent." *Quinn* v. *Haynes*, 234 F.3d 837, 844 (4th Cir. 2000) (citing *Williams*, 529 U.S. at 413). "A legal principle, by definition, applies to diverse factual scenarios. And those factual scenarios can differ in innumerable ways, so long as they are analogous on the point to which the legal principle applies." *Robinson* v. *Polk*, 444 F.3d 225, 232 (4th Cir. 2006) (per curiam) (King, J., dissenting from the denial of rehearing *en banc*) (citing *Wiggins* v. *Smith*, 539 U.S. 510, 520 (2003)).

2. The Michigan Supreme Court's decision was an unreasonable application of Supreme Court precedent warranting habeas relief.

Habeas relief is required where the state court decision unreasonably applies the clearly established precedent to the facts of the case. *Williams*, 529 U.S. at 413. It is not enough that the state court decision is "incorrect" or "erroneous"; rather, "[t]he state court's application of clearly established law must be objectively unreasonable." *Lockyer*, 538 U.S. at 75 (citing *Williams*, 529 U.S. at 410). While this Court's precedent is the starting and ending point under 28 U.S.C. § 2254(d)(1), lower federal court decisions applying those holdings are useful for determining whether a legal principle is clearly established, and as a guide for determining whether precedent was reasonably applied. The Sixth Circuit recognized the value of its own precedent to assess the reasonableness of the state court's decision. Pet. App. 10a ("the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue."). See also *Phoenix* v. *Matesanz*, 233 F.3d 77, 83 n.3 (1st Cir. 2000); *Copeland* v. *Washington*, 232 F.3d 969, 974 (8th Cir. 2000); *Lajoie* v. *Thompson*, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

The Sixth Circuit held that the state trial court did not exercise "sound discretion" where the judge did not seek input of the parties, did not appear to consider alternatives, and acted abruptly in declaring a mistrial. Pet. App. 14a-15a. As shown above, the Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was an objectively unreasonable application of this Court's law.

The trial court discharged the jury less than five minutes after they inquired what would happen "if" they could not agree upon a verdict. Pet. App. 93a. To conclude that "sound discretion" was exercised here, or that a "manifest necessity" existed—either based upon the three minute exchange with the foreperson or by any other equivocal factors gleaned from the record—was an objectively unreasonable application of this Court's precedent.

Applying the principles of *Perez*, *Jorn* and *Washington*, the Sixth Circuit correctly determined that the Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was an unreasonable application of this Court's precedent, and required habeas corpus relief. In so doing, the Sixth Circuit explained precisely why the mistrial declaration in this case was not an exercise of sound discretion:

> First, the trial judge declared a mistrial without pausing to hear from counsel, and the brief colloquy leading to the judge's declaration—lasting all of three minutes—was immediately followed by the dismissal of the jury, providing counsel no opportunity to object. Second, the record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving a "deadlocked jury" instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate. Any of these courses of action would have been reasonable, given that the jury had only deliberated for three or four hours in this first-degree murder trial. Third, and most troubling, the judge's declaration was inexplicably abrupt, making it "abundantly

> apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the *sua sponte* declaration of this mistrial." *Jorn*, 400 U.S. at 487.

Pet. App. 14a-15a.

It is with the Sixth Circuit's mention of possible alternative actions that Petitioner finds fault and claims that no specific action is required by this Court's precedent. But the Sixth Circuit's opinion did not rest exclusively on the failure to provide a deadlocked jury instruction, or failure to consult with the parties, or poll the jury. Rather, the Sixth Circuit's decision was that there was a failure to do *anything* sufficient to satisfy the requirement of exercising "sound discretion". Any contrary conclusion by the state Supreme Court was an objectively unreasonable application of this Court's precedent.

Petitioner also takes issue with a perceived lack of deference by the Sixth Circuit to the state court's determination. Deference is required, but it is not absolute. To be sure, *Perez* explicitly contemplates appellate review by requiring that the record support the trial court's decision. As this Court observed in *Somerville*, the rationale of *Perez* is that "[where] a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry. . . ." 410 U.S. at 467-68. It is clear that "reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington*, 434 U.S. at 514. Deference may guide the inquiry, but inquiry is absolutely required. The Sixth Circuit observed, "discretion does not equal license; the Fifth

Amendment's guarantee against double jeopardy would be a sham if trial judges' declarations of 'necessary' mistrials were in fact to go unreviewed." Pet. App. 8a (quoting *United States* v. *Sisk*, 629 F.2d 1174, 1178 (6th Cir. 1980)). The fact that this is a habeas case changes the review to the extent that it is examined through the lens of objective unreasonableness. Where, as here, the state court decision is an objectively unreasonable determination that "sound discretion" was used by the trial court, habeas relief is indeed warranted. 28 U.S.C. § 2254(d)(1).

a. There is no "split" amongst the circuits or around the country in this area of law, only factual differences that are outcome determinative.

Petitioner argues that a "variation between the circuits" has emerged that evinces a lack of clearly-established Supreme Court precedent. Pet. Br. 38-41. To the contrary, the circuits have coherently performed the task of deciding whether a judge exercised "sound discretion" to find the "manifest necessity" required for a mistrial. Far from bolstering the claim of uncertainty, the circuits' concordant analysis in this area reveals the law is both clearly established and consistently applied, albeit to inevitably distinctive facts. The Sixth Circuit's conclusion that relief was required in this case would have been reached by any reviewing circuit court, as the analyses used by each—even if not identical—are nonetheless compatible and substantially the same.

Some circuits have indeed found sufficient evidence of deadlock and justification for a mistrial where

there was a given time that the jury had deliberated, while other courts have found a lack of manifest necessity where juries had deliberated for comparable time periods. Pet. Br. 38-39. But different results can be fully expected where this Court has expressly rejected a mechanical formula for exercising sound discretion and finding a manifest necessity. See *Somerville*, 410 U.S. at 462. Instead, it is clearly established that "all circumstances" be considered before a mistrial is declared. *Perez*, 22 U.S. (9 Wheat.) at 580; see also *Jorn*, 400 U.S. at 487. Under this requirement, a jury's deliberation time is but one circumstance to be weighed. When the time of deliberation is viewed out of context, similar periods of deliberation would fall on either side of the line separating sound from unsound discretion. Singular, or even primary, focus on deliberation time would be patently misguided, and has never been proffered as a legal standard in this case.

None of the cases cited by Petitioner to illuminate this supposed inconsistency had endeavored to set a time limit for finding juror deadlock. Rather, each case properly contemplated the length the jury had deliberated as but one factor in the sound discretion inquiry. Compare Pet. Br. 39-41. For example, in *United States* v. *Lorenzo*, 570 F.2d 294, 299 (9th Cir. 1987), the trial court questioned all jurors to definitively confirm there was no possibility of overcoming the deadlock, which demonstrated sound discretion despite a relatively brief deliberation period, particularly where the trial was not particularly complex or lengthy. Similarly, the jurors' *collective* opinion that it was hopelessly deadlocked, following a note saying that a single juror would not budge in her position, weighed against a relatively short period of deliberation to support a

finding that sound discretion was used in *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1029-30 (9th Cir. 2000). Finally, in *Fay* v. *McCotter*, a three hour deliberation period was considered in light of the jury foreperson confirming that the jury was split "three-quarters to a quarter" in a relatively short, single issue trial. 765 F.2d 475, 476-78 (5th Cir. 1985).

The cases Petitioner cites that found a lack of manifest necessity despite comparable periods of deliberation came out differently precisely because additional facts were considered and those unique facts set the cases apart from others. In *United States* v. *Gordy*, 526 F.2d 631 (5th Cir. 1976), a mistrial declaration was deemed erroneous not simply because the jury had deliberated for only five and a half hours, but in large part because it appeared that the judge had acted for reasons "unrelated to the trial problem which purport[ed] to be the basis for the mistrial ruling." *Washington*, 434 U.S. at 510, n.28 (citing *Gordy, supra*). In *United States ex rel. Webb* v. *Ct. of Common Pleas*, 516 F.2d 1034, 1036 (3d Cir. 1975), a finding of sound discretion was rejected not only on the basis of a six and a half hour deliberation time, but also because the trial judge had *sua sponte* initiated a colloquy with the jury foreperson regarding deadlock, the jury as a whole was not polled to assure such deadlock, and the parties were not consulted prior to the mistrial declaration. Indeed, Petitioner undermines its own claim that it is application of law rather than application of fact driving these divergent outcomes, when it asserts that *Gordy* and *Webb* are "distinguishable from the facts here." Pet. Br. 39. That divergent facts render divergent outcomes when viewed under the same legal standard does not evince

a circuit split, nor the lesser "variation between circuits." *Id.* at 38.

Petitioner's attempt to portray variance (and therefore a lack of clearly established law) by a sampling of selected federal circuit "guideposts" for determining sound discretion is similarly unavailing. Pet. Br. 41-43. In fact, there is far from a "split" among the circuits. Examples from the First, Second, Third, and Seventh Circuits supplied by Petitioner illustrate this point. In various forms, each circuit implicitly or explicitly calls for signs of adequate reflection from the trial judge before declaring a mistrial. See *United States* v. *Charlton*, 502 F.3d 1, 5 (1st Cir. 2007) (courts should examine whether mistrial declaration was "made after sufficient reflection") (internal citations omitted); *United States* v. *Razmilovic*, 507 F.3d 130, 137-38 (2d Cir. 2007)(examination of steps taken by trial court to ensure jury deadlocked and confirm that further deliberations would be fruitless relevant to sound discretion); *United States* v. *Wecht*, 541 F.3d 493, 506 (3d Cir. 2008) (itemizing factors including that "adequate reflection" must precede declaration of a mistrial); *United States* v. *Byrski*, 854 F.2d 955, 961 (7th Cir. 1988) (court should consider effects of possible exhaustion and the impact which coercion of further deliberations might have had on the verdict, and question the jury, to determine whether further deliberations would be helpful).

Adequate reflection can be shown by the judge taking steps to assure him or herself that the jury truly can not agree, that additional deliberations would be fruitless, and that alternatives to a mistrial are not reasonable or viable. *Charlton*, 502 F.3d at 5 ("whether alternatives to a mistrial were explored and exhausted" relevant to sound discretion);

Razmilovic, 507 F.3d at 138 ("alternatives [to a mistrial] that the district court chose not to pursue" relevant to sound discretion); *Wecht*, 541 F.3d at 506 (jury's opinion that it cannot agree and possible negative effects of requiring further deliberations should be considered); *Byrski*, 854 F.2d at 961 (urging courts to consider "the effects of possible exhaustion and the impact which coercion of further deliberations might have had on the verdict.") (internal citation omitted). While some circuits offer additional guideposts, such as the length and complexity of the trial, length of deliberations, and communications from the jury regarding deadlock, see *Razmilovic, supra*, *Wecht, supra*, and *Byrski, supra*, those considerations are merely more specific means of determining that a jury was truly deadlocked, that additional deliberations would not yield a sound verdict, and that there were not reasonable alternatives to a mistrial.

While each of these circuits may not articulate their considerations identically, their approaches are remarkably similar if not entirely consistent with one another and with the "sound discretion" that *Perez* and its progeny demand. What can be drawn from these examples (and many others like them) is that while there is no mechanical formula, *something* must be done, or something more must exist, beyond what was done and existed here to establish sound discretion. That is the essence of *Perez's* requirement that "all circumstances" be considered before a judge declares a mistrial. 22 U.S. (9 Wheat.) at 580.

Examination of so-called guideposts from beyond the four circuits surveyed by Petitioner reveals similar synergy. The cases are not limited to the hung jury situation, but nevertheless develop context

for the "sound discretion" and "manifest necessity" inquiries.

To determine whether sound discretion was exercised in any mistrial declaration, the Fourth Circuit asks whether the trial judge "acted precipitately" or whether it displayed concern for the possible double jeopardy consequences of a mistrial declaration. *Gilliam* v. *Foster*, 75 F.3d 881, 894-95 (4th Cir. 1996); see also *United States* v. *Sloan*, 36 F.3d 386, 394 (4th Cir. 1994); *United States* v. *Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993). Whether the trial court heard input from the parties and considered "less drastic alternatives" to a mistrial are also key factors in the sound discretion equation. *Shafer, supra.* These more broadly articulated considerations clearly overlap with and encompass the more specific factors deemed important by the four circuits listed above in determining sound discretion in the specific instance of jury deadlock.[8]

The Fifth Circuit has similarly held that: (1) the length of the trial, (2) the complexity of the issues involved, (3) the length of deliberations, (4) the district court's communications with the jurors, (5)

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[8] The consistency of the Fourth Circuit's approach is actually highlighted in *Winston* v. *Moore*, 452 U.S. 944 (1981) (Rehnquist, J., dissenting from denial of certiorari), cited repeatedly by Petitioner. Pet. Br. 34, 37, 50. Justice Rehnquist's dissent explains that habeas relief was granted by the District Court and affirmed by the Fourth Circuit where the trial judge declared a mistrial without exercising sound discretion in determining that the jury was actually deadlocked. The decision to grant habeas relief was premised on the facts that the jury had not deliberated very long (2 ½ hours during which a deadlocked jury instruction was given) and the jury had not expressly stated as a whole that they were deadlocked. Habeas relief was granted even in the absence of a defense objection to the mistrial.

jury statements regarding deadlock, and (6) whether alternatives to a mistrial were considered are all useful guideposts in the sound discretion equation. *Gordy*, 526 F.2d at 635-36. See also *Grandberry* v. *Bonner*, 653 F.2d 1010, 1014 (5th Cir. 1981); *United States* v. *Starling*, 571 F.2d 934 (5th Cir. 1978).

Like most or all of its sister circuits, the Sixth Circuit asks whether the trial judge heard or solicited input from the parties on the propriety of a mistrial, considered alternatives to a mistrial, and acted "deliberately, instead of abruptly." *Fulton* v. *Moore*, 520 F.3d 522, 529 (6th Cir. 2008) (citing *Washington*, 434 U.S. at 515-16). That circuit likewise considers whether there was a timely objection by defendant, the jury's collective opinion that it cannot agree, the length of deliberations, the length and complexity of the trial, the nature of communications between jury and judge, the effects of exhaustion and potential for coercing a verdict if deliberations were to continue, and the trial judge's belief that additional trials will result in continued hung juries. *Jones* v. *Hogg*, 732 F.2d 53, 56 (6th Cir. 1984).

Ninth Circuit "guideposts" include the jurors' collective opinion that they can not agree, the length of the trial and complexity of the issues, the length of time the jury has deliberated, whether the defendant has objected to a mistrial, and the effects of exhaustion or coercion on the jury. *Hernandez-Guardado*, 228 F.3d at 1029. For manifest necessity rulings in general, that circuit also stresses the importance of any input from counsel for the parties, and the consideration of alternatives to a mistrial. See *United States* v. *Chapman*, 524 F.3d 1073, 1082 (9th Cir. 2008).

In *United States* v. *Horn*, 583 F.2d 1124, 1127-28 (10th Cir. 1978), the Tenth Circuit reviewed the

guideposts suggested by the Fifth and Ninth Circuits and also looked to factors considered by the Second and Third Circuits to determine whether sound discretion was exercised in finding jury deadlock and declaring a mistrial. (Citing *Arnold* v. *McCarthy*, 566 F.2d 1377 (9th Cir. 1978); *Gordy*, 526 F.2d 631; *United States ex rel. Russo* v. *Superior Court*, 483 F.2d 7 (3d Cir. 1973); *Webb*, 516 F.2d 1034; *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975)).

Notably, "the need for careful consideration of alternatives to mistrial, and the hard lesson of retrials barred by double jeopardy when there was no such consideration" is reflected in Federal Rule of Criminal Procedure 26.3. *Sloan*, 36 F.3d at 394. The rule requires that "[b]efore ordering a mistrial, the court shall provide an opportunity for the government and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives." *Id.* (alteration in original).

Thus, a review of these circuits and their guideposts reveals consistency in the application of this Court's clearly established precedent to a highly fact-specific inquiry. Compare *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006) (finding no clearly established precedent to support habeas relief for *spectator* conduct during trial despite some circuit court extension of precedent premised on *state sponsored* conduct). Here, there are no gaps, inconsistencies, divergences, or disagreements among lower courts in their inquiry into sound discretion and manifest necessity as required by *Perez*, *Jorn*, and *Washington*.

In fact, the consistency among the federal circuits only reinforces the conclusion that the state court unreasonably applied this Court's precedent in

holding that the mistrial declaration was justified by manifest necessity. 28 U.S.C. § 2254(d)(1). See generally *supra* Part I.B.2; Pet. App. 10a ("the decisions of lower federal courts may be instructive in assessing the reasonableness of a state court's resolution of an issue") (internal citation omitted). Examination of the circuit decisions surveyed above reveals the overwhelming principle that even in cases of jury deadlock, sound discretion requires courts to treat the declaration of a mistrial as something closer to a last resort than the near first resort treatment it was given by the state court in this case. It is readily apparent that a lack of sound discretion would have been found upon applying any considerations used by the various circuits. In less than four minutes, the trial judge rammed through essentially a two-question colloquy that was initiated by a simple jury question of what "if we can't agree?" Pet. App. 93a-94a. The judge assumed the jury was hopelessly deadlocked, then extracted a one word answer of "no" by asking the foreperson whether the jury was "going to reach unanimous verdict . . . Yes or no?" *Id.* No clarifying questions were asked to glean whether the possible impasse was momentary, long term, or permanent. *Razmilovic*, 507 F.3d at 137-38 (actions judge took to determine whether there was genuine deadlock relevant); *Hernadez-Guardado*, 228 F.3d at 1029 (noting that "critical factor" to be considered is "jury's own statement that it is unable to reach a verdict." (internal quotations omitted)); *Byrski*, 854 F.2d at 961 (same); *Horn*, 583 F.2d at 1127 (same). The judge made no effort to clarify the foreperson's ambiguous answer to an ambiguous question by asking follow-up questions or the other jurors for their opinions. *Hernandez-Guardado*, *supra* (jury's collective opinion regarding deadlock important); see also *Wecht*, 541 F.3d at 500 (same); *Hogg*, 732 F.2d at

56 (same); *Horn*, 583 F.2d at 1127 (same). The judge abruptly declared a mistrial, with no reflection, after giving no opportunity for input from counsel for the parties. Compare Fed. R. Crim. P. 26.3; *Charlton*, 502 F.3d at 5; *Gilliam*, 75 F.3d at 894-95; *Chapman*, 524 F.3d at 1082; *Wecht*, 541 F.3d at 506; *United States* v. *Berroa*, 374 F.3d 1053, 1058 (11th Cir. 2004). There was obviously no thought given to alternatives to a mistrial, such as simply answering the jury question by explaining what would happen if the jury could not agree, ordering additional deliberations, or giving a deadlock jury instruction. *Charlton*, 502 F.3d at 5-6; *Razmilovic*, 507 F.3d at 138.

The trial judge simply failed this Court's clear directive to take "all circumstances into account" before finding jury deadlock and declaring a mistrial. *Perez*, 22 U.S. (9 Wheat.) at 580; see also *Jorn*, 400 U.S. at 487. Thus, as the Sixth Circuit held, under any objectively reasonable application of this Court's manifest necessity holdings, sound discretion would not and should not be found.

b. Claims regarding the application of 28 U.S.C. §§ 2254(d)(2) and (e)(1) have not been fairly presented.

Petitioner makes a passing assertion that the Sixth Circuit's "lack of deference" to the state court decision runs afoul of 28 U.S.C. § 2254 (e)(2)[9] by failing to

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[9] 28 U.S.C. § 2254(e)(1) provides:

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the

presume the correctness of the state court's "factual" determination that the jury was deadlocked. Pet. Br. 50. To the extent Petitioner attempts to advance such an argument, it should be rejected as it has not been "fairly included" in either the petition for certiorari or its merits brief questions presented. See Sup. Ct. R. 14.1(a); *Wood* v. *Allen*, No. 08-9156, 2010 WL 173369, at *8 (U.S. Jan. 20, 2010). "The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice* v. *Collins*, 546 U.S. 333, 342 (2006). While its question presented cites 28 U.S.C. § 2254 as a whole, Petitioner specifies the argument it seeks to raise herein by phrasing the issue as one of whether the state court "failed to apply clearly-established Supreme Court precedent. . . . [I]n denying relief on double jeopardy grounds. . . ." Pet. Br. i. This near-verbatim recitation of 28 U.S.C. § 2254(d)(1) to the exclusion of any reference to a factual dispute that evokes § 2254(e)(1) does not fairly include a claim under the latter subsection. *Wood*, 2010 WL 173369, at *9. Nor does Petitioner's passing reference to 28 U.S.C. § 2254(e)(1) in the text of its petition for certiorari properly raise the issue in this Court. *Wood*, 2010 WL 173369, at *8 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993)).

Even if the perfunctory 28 U.S.C. § 2254(e)(1) assertion were given consideration, Petitioner's contention in this regard is unavailing. Whether manifest necessity existed is a mixed question of law and fact. See *Wecht*, 541 F.3d at 504-05. The underlying facts leading up to the mistrial declaration—the length of the trial and jury

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presumption of correctness by clear and convincing evidence."

deliberations, the jury note(s), and the substance of the trial judge's truncated inquiry—are not contested. Rather, as the Sixth Circuit held, the state court unreasonably applied the requirements of *Perez* and its progeny to those undisputed facts. In other words, the trial judge failed to "take all circumstances into account" to find deadlock; it used far from "great caution" in racing through its ambiguous inquiry; and it did not err on the side of Mr. Lett in abruptly declaring a mistrial. *Perez*, 22 U.S. (9 Wheat.) at 580. This flawed approach lead to the fundamentally unreasonable legal determination that "sound discretion" was exercised, or that there was a "high degree" of necessity to overcome the double jeopardy bar against retrial. *Washington*, 434 U.S. at 506-07 & n.18. Accordingly, habeas relief was properly granted within the confines of 28 U.S.C. § 2254(d)(1).

3. The fact that Mr. Lett did not "object" to the mistrial or retrial is true, but irrelevant.

Petitioner correctly asserts that Mr. Lett did not "object" to the declaration of a mistrial at any time prior to raising the issue for the first time on appeal. See, *e.g.*, Pet. Br. 8, 44, 50. On direct appeal, the Michigan Court of Appeals held that plain error occurred despite the absence of an objection.[10] Pet.

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[10] At the time that Mr. Lett filed his original brief on appeal in 1998, the law in Michigan was that a defendant could raise a double jeopardy violation for the first time on appeal and it would be subject to de novo review. *People* v. *Lugo*, 542 N.W.2d 921, 925 (Mich. Ct. App. 1995) (per curiam). Though *Lugo* has not been specifically overruled, the Michigan Court of Appeals recognizes the Michigan Supreme Court decision in *People* v. *Carines*, 597 N.W.2d 130, 138-39 (Mich. 1999) applies plain error review to all unpreserved claims of constitutional error.

App. 72a. The Michigan Supreme Court essentially ignored the "plain error" nature of the question presented by the local prosecutor and held that no error occurred on the merits, without addressing whether the failure to object posed a specific obstacle to relief in this case, beyond being part of the general conclusion that manifest necessity existed. Pet. App. 39a-61a.

Mr. Lett does not dispute that his trial attorney could theoretically have objected prior to the retrial on double jeopardy grounds. He did not. But an objection would not have obviated the error. As dissenting Justice Cavanagh explained, there was no opportunity to object to the mistrial and thus no inferences should be drawn from the failure to object. Pet. App. 65a ("Though an objection on the record would have been helpful in determining defendant's position and in refreshing the judge concerning her duty to exercise sound discretion, defense counsel's failure to voice an objection cannot be considered evidence that a mistrial declaration was manifestly necessary.") (Cavanagh, J., dissenting). This is especially so where Mr. Lett "gain[ed] nothing" by submitting to a retrial despite the double jeopardy violation. *Id.*

In granting habeas corpus relief, the District Judge echoed Justice Cavanagh's findings that the lack of objection was irrelevant to the manifest necessity determination on the facts of this case:

> The state court also pointed to the absence of objection to the mistrial from defense counsel. Certainly, lack of objection is a factor to consider if it can lead to the conclusion of acquiescence in

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See People v. *Matuszak*, 687 N.W. 2d 342, 347 n.1 (Mich. Ct. App. 2004).

> the trial judge's actions. However, as acknowledged by the state supreme court, there is no evidence in this record that the trial judge ever advised counsel as to the substance of the jury's note or engaged counsel in any discussion. To the contrary, it appears that the trial judge acted precipitously, and her announcement of a mistrial was the first notice defense counsel had of the court's intended action. An objection after the fact perhaps would have completed the record, but it is unlikely that it would have changed the result. In the absence of any discussion by counsel on the record of any nature concerning the termination of the first trial, the lack of objection does little to fortify the conclusion that a mistrial was necessary.

Pet. App. 34a-35a.

The Sixth Circuit was justifiably unconcerned with counsel's failure to object to the retrial on double jeopardy grounds, where it was clear from the record that Mr. Lett did not *acquiesce* in the decision to declare a mistrial. Pet. App. 14a. *Perez* originally spoke to this acquiescence, by considering whether the defendant was retried "without the consent" of the parties. *Perez*, 22 U.S. (9 Wheat.) at 579. From there, this Court recognized that the lack of objection carries little weight where, as here, there was no opportunity to object before it was too late. See *Jorn*, 400 U.S. at 487. The Sixth Circuit rightfully gave little weight to the lack of objection, where, "'the trial judge acted so abruptly in discharging the jury that, had the . . . defendant [been disposed] to object to the discharge of the jury, there would have been no opportunity to do so.'" Pet. App. 13a-14a (quoting *Jorn*, 400 U.S. at 487).

An objection is only useful to the extent that there is an opportunity to object prior to the mistrial being declared. If the mistrial was not "manifestly necessary", Mr. Lett's failure to object in no way undermines the error where the trial court acts without warning or opportunity. This Court's decisions in *Perez* and *Jorn* focus on objections *before* the mistrial is declared. An objection after the fact is entirely academic. Accordingly, the lack of objection should pose no bar to relief in this case.

* * *

The trial court did not exercise "sound discretion" in declaring a mistrial. The Michigan Supreme Court's decision to reinstate Mr. Lett's convictions was an unreasonable application of this Court's clearly established precedent. For all of these reasons, habeas relief was properly granted.

CONCLUSION

Reginald Lett respectfully requests that this Court AFFIRM the decisions of the Sixth Circuit and the Eastern District of Michigan to GRANT habeas corpus relief.

Respectfully submitted,

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REPLY BRIEF

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No. 09-338

In The
Supreme Court of the United States

PAUL RENICO

Petitioner,

v.

REGINALD LETT

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. The State trial court properly exercised sound discretion in determining that the jury was deadlocked, and the Michigan Supreme Court's review of that record was not objectively unreasonable when it applied this Court's clearly-established precedent and concluded that the trial court had not abused its discretion in discharging the jury 2

II. This Court's clearly-established precedent holds that a trial court's exercise of sound discretion to discharge a jury should be deferred to. 10

III. There is no clearly-established precedent that requires trial courts to take additional measures or force deliberations for some unspecified amount of time, and the Sixth Circuit cannot give greater definition to this Court's general, deferential standard by imposing its own test and new requirements. 13

A. Clearly established precedent of this Court is to be narrowly drawn. 13

B. The Sixth Circuit improperly drew from its circuit precedent and misapprehended this Court's clearly-established precedent that recognizes a deferential standard. 14

C. Irrespective of the varying guideposts used by the circuits, Lett only produces a handful of readily distinguishable cases where the circuits have found an abuse of discretion when reviewing a mistrial due to a deadlocked jury. 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Allen v. United States,
164 U.S. 492 (1896) 16

Arizona v. Washington,
434 U.S. 497 (1978) ..... passim

Fay v. McCotter,
765 F.2d 475 (5th Cir. 1985)..... 20

Gori v. United States,
367 U.S. 364 (1961). 8, 11

House v. Hatch,
527 F.3d 1010, 1017 (10th Cir. 2008) 19

Illinois v. Somerville,
410 U.S. 458 (1973) 10, 18

Klein v. Leis,
548 F.3d 425 (6th Cir. 2008) 23

Knowles v. Mizayance,
566 U.S. ___; 129 S. Ct. 1411 (2009)..... 12, 14

Lett v. Renico,
316 F. App'x 421 (6th Cir. 2009)..... 10, 14, 15

Lindsay v. Smith,
820 F.2d 1137 (11th Cir. 1987) 20

Lyell v. Renico,
470 F.3d 1177 (6th Cir. 2006)..... 16

Moose Lodge No. 107 v. Irvis,
407 U.S. 163 (1972) 8

People v. Lett,
466 Mich. 206; 644 N.W.2d 743 (2002) ..... passim

Richardson v. United States,
429 U.S. 14 (1976) 2

Ross v. Petro,
515 F.3d 653 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 906 (2009) 23

Smith v. Spisak,
130 S. Ct. 676 (2010) 14

Thaler v. Haynes,
175 L. Ed. 2d 1003 (2010) 14

United States ex rel. Webb v. Court of Common Pleas,
516 F.2d 1034 (3d Cir. 1975) 21

United States v. Clinton,
338 F.3d 483 (6th Cir. 2003) 16

United States v. Gordy,
526 F.2d 631 (5th Cir. 1976) 11, 21

United States v. Horn,
583 F.2d 1124 (10th Cir. 1978) 21

United States v. Jorn,
400 U.S. 470 (1971) 18

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 2, 4, 10

United States v. Razmilovic,
507 F.3d 130 (2d Cir. 2007) 21

United States v. Starling,
571 F.2d 934 (5th Cir. 1978) 21

Wade v. Hunter,
336 U.S. 684 (1949) 10

Walls v. Konteh,
490 F.3d 432 (6th Cir. 2007) 23

Williams v. Taylor,
529 U.S. 362 (2000) 9, 12, 13

Winston v. Moore,
452 U.S. 944 (1981) 16

Woodford v. Visciotti,
537 U.S. 19 (2002) 9

Yarborough v. Alvarado,
541 U.S. 652 (2004) 12, 13

Statutes

28 U.S.C. § 2254 1

28 U.S.C. § 2254(d) 13, 14

28 U.S.C. § 2254(d)(1) ..... passim

28 U.S.C. § 2254(d)(2) 6

28 U.S.C. § 2254(e)(1) 6

Other Authorities

1 S. Childress & M. Davis, Federal Standards of Review § 4.21 12

Random House Webster's College Dictionary 352, 700, 701, 1040 (2001) 9

The Hon. Henry J. Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 763-65 (1982) 12

Rules

Supreme Court Rule 14 6

INTRODUCTION

Lett's abridged reading of the record cannot change the facts. Those facts show that the trial court exercised sound discretion when it determined the jury was deadlocked. It did so only after receiving notes from the jury indicating deliberations were acrimonious and questioning what would happen if they could not agree. When asked point-blank whether the jury would be able to reach a unanimous verdict, the jury foreperson unequivocally answered, "No, Judge." Moreover, the fact that all this occurred over a span of four hours of deliberations for a relatively uncomplicated trial underscores the validity of the Michigan Supreme Court's decision that the trial court did not abuse its discretion in declaring a mistrial.

Lett's double-jeopardy analysis is faulty in several respects. First, it fails to recognize that the Michigan Supreme Court correctly identified and applied this Court's clearly-established precedent when it reviewed whether the State trial court had abused its discretion. Second, it fails to apply the dual layers of deference necessary in this case by not giving full effect to the requirement under 28 U.S.C. § 2254, *et seq.*, that a federal habeas corpus court's review is not whether the State court was "incorrect"; rather its review is limited to whether the State court decision was "objectively unreasonable" and by ignoring the broad discretion given the trial court's deadlocked jury determination. Third, it also fails to recognize that federal habeas corpus courts may not impose new rules on State courts when examining the reasonableness of their decisions.

ARGUMENT

I. The State trial court properly exercised sound discretion in determining that the jury was deadlocked, and the Michigan Supreme Court's review of that record was not objectively unreasonable when it applied this Court's clearly-established precedent and concluded that the trial court had not abused its discretion in discharging the jury.

The State trial court exercised its sound discretion in declaring a mistrial and was in the best position to determine whether the jury was deadlocked. It properly balanced Lett's right to have his case decided by a single tribunal in conjunction with society's interest in having a fair opportunity to vindicate its laws, and the avoidance of a coerced verdict.

In reviewing the record and the State trial court's mistrial declaration, the Michigan Supreme Court applied the correct general constitutional standard and properly concluded that the trial court acted within its discretion in finding that the jury would not be able to reach a verdict.[1] The Michigan Supreme Court gave a meaningful review to the trial court's mistrial declaration.

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[1] *People v. Lett*, 466 Mich. 206; 644 N.W.2d 743, 747-53 (2002) (applying *Arizona v. Washington*, 434 U.S. 497 (1978) and *Richardson v. United States*, 429 U.S. 14 (1976), citing *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824)); Pet. App. 46a-60a. *See Arizona*, 434 U.S. at 516-17 (determining that when the record is sufficient to justify the declaration of a mistrial, there is no requirement that the trial court clearly explain its ruling).

It first noted the deliberation time, in light of the limited complexity of the trial, saying, "The jury had deliberated for at least four hours following a relatively short, and far from complex, trial."[2] Nowhere does Lett refute these predicate factual points.

Next, the Michigan Supreme Court recognized that the jury had sent notes – showing open communications between the trial court and the jury – including one indicating possibly acrimonious deliberations between the jurors, stating: "The jury had sent out several notes over the course of its deliberations, including one that appears to indicate that its discussions may have been particularly heated."[3]

Lett brushes aside the importance of these notes by claiming, "The trial judge thought so little of the 'notes' that they were not preserved as part of the record . . . and therefore can not carry the weight the Michigan Supreme Court assigned to them." Resp. Br. p. 16. However, it is clear that the notes were very much a part of the trial record that was reviewed by the Michigan Supreme Court. Although the notes were not part of the federal habeas record, Lett's request that the notes be obtained from the State court record be lodged confirms that the notes were preserved as part of the State court record. The content of the notes was neither misconstrued nor manufactured.

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[2] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

[3] *Lett*, 644 N.W.2d at 753; Pet. App. 59a.

As to the potential acrimonious deliberations, Lett proffers nothing to dispute the Michigan Supreme Court's interpretation of that note. In fact, Lett only mentions that "the Michigan Supreme Court placed emphasis" on the note indicating potential acrimonious deliberations. Resp. Br. p. 15 n.4. There is nothing untoward with this because consideration of potential acrimonious deliberations is consistent with a trial court exercising its sound discretion in light of all the considerations before it.[4] Indeed, ignoring the note would be unsound.

Lett mischaracterizes the State trial court's actions regarding the note indicating a potential deadlock. The noted stated, "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'"[5] Lett suggests that "[t]he note was asking the judge for more information. . . ." Resp. Br. pp. 17-18. Or, Lett suggests, the jury was merely posing a hypothetical question, devoid of any meaning behind the question. Resp. Br. p. 6. These contentions are nothing more than Lett's subjective spin on the facts.

Lett also claims that "[t]he trial court's assertion of 'deadlock' based on the jury's written question was presumptuous." Resp. Br. p. 17. But that is not what occurred. The State trial court had already received a note reasonably indicating acrimonious deliberations. It then received the note that indicated a potential deadlock. And, after receiving those two notes, the Court had a colloquy with the foreperson. Pet. App.

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[4] *See Perez*, 22 U.S. (9 Wheat.) at 580; *Lett*, 644 N.W.2d at 746, n.2, 753; Pet. App. 42a, 59a.

[5] *Lett*, 644 N.W.2d at 745; Pet. App. 41a.

93a-94a. Only after the colloquy did the trial judge determine that the jury was hopelessly deadlocked.

Finally, the Michigan Supreme Court determined that the jury, through the foreperson, had indicated a deadlock and held that because there was manifest necessity, there was no double-jeopardy bar to Lett's second trial:

> Most important here is the fact that the jury foreperson expressly stated that the jury was not going to reach a verdict.[6]

Lett claims that the jury was not "genuinely deadlocked," saying that "the foreperson's statements do not establish that the jury was hopelessly deadlocked" and that the trial court simply surmised "that the jury *might* be deadlocked." Resp. Br. pp. 7, 13.

Here, however, after receiving the two notes and four hours of deliberations, the State trial court asked, "I need to ask you if the jury is deadlocked; in other words is there a disagreement?" Pet. App. 93a. The foreperson unequivocally responded, "Yes, there is." Pet. App. 93a. Then, the trial court asked, "All right. Do you believe that it is hopelessly deadlocked?" Pet. App. 93a-94a. After stopping the foreperson from giving a potential breakdown of the verdict, the trial court clearly inquired, "Are you going to reach a unanimous verdict or not?" Pet. App. 94a. The foreperson again unequivocally responded, "No, Judge." Pet. App. 94a. Lett's position that "[t]he foreperson's

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[6] *Lett*, 644 N.W.2d at 753; Pet. App. 59a-60a.

answer to the court's question about 'unanimous verdict' was ambiguous in context" is contrary to the actual record. Resp. Br. p. 18. The determination by the State courts that the foreperson clearly stated that the jury was hopelessly deadlocked was reasonable and entitled to deference under 28 U.S.C. § (e)(1).[7]

The trial court did not "demand[ ]" answers affirming the existence of a deadlock, nor "ram[ ]" through the colloquy, nor "extract[ ]" responses from the foreperson. Respondent's Brief, pp. 16, 34. Rather, in light of all the circumstances and the clear expression of deadlock by the foreperson, there was no ambiguity and no need "to clarify the foreperson's ambiguous answer to an ambiguous question by asking follow-up questions or the other jurors' for their opinions" as argued by Lett. Resp. Br. p. 34. The State trial court here was not acting on a "hunch." Resp. Br. p. 18. There is no "clearly established" authority from this Court that the State trial court had to challenge the foreperson's expression of a deadlock.[8]

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[7] Lett argues that the State of Michigan has not fairly presented to this Court any claims regarding deference under 28 U.S.C. § 2254(d)(2) and (e)(1). The State of Michigan did not purport to bring the petition under (d)(2). Rather, the State of Michigan presented the question as both a clearly established and unreasonable application case under (d)(1), with the factual predicates involving the jury's deliberations, the jury's notes, and the complexity and nature of the trial, and the expression of a deadlock resolved by the Michigan Supreme Court being entitled to deference under (e)(1). Pet. Br. pp. 30-31. These factual assertions were made below and in the petition for certiorari, and they are therefore fairly presented to this Court. Further, under Supreme Court Rule 14, every fairly presented question contains the subsidiary questions, and the issue of (e)(1) deference was fairly presented in the body of the petition under Rule 14.

[8] *See* 28 U.S.C. § 2254(d)(1).

The Michigan Supreme Court was well-aware of this Court's concern regarding forced deliberations rendering a coerced verdict.[9] But in response to this concern over avoiding coerced verdicts, Lett relegates the danger to a single footnote: "This deference is also rooted in a legitimate concern that *too much appellate second guessing* might lead trial courts to use coercive means to break apparent jury deadlocks, thereby forcing unjust and unsound verdicts." Resp. Br. p. 13 n.3 (emphasis added).

The irony of Lett's minimization of the concern regarding coerced verdicts is that if the State trial court had been indifferent to coercion and forced longer deliberations, Lett could perhaps challenge an unfavorable verdict as coerced and unjustly obtained. After all, the first note indicated "'a concern about our voice levels disturbing other proceedings that might be going on.'"[10] The second note indicated, "'What if we can't agree? [M]istrial? [R]etrial? [W]hat?'"[11] Finally, when asked whether the jury would be able to reach a unanimous verdict, the foreperson unequivocally indicated, "No." Pet. App. 94a.

This is precisely why this Court in *Arizona* recognized the need for broad discretion: to balance a defendant's right to have his case decided by a single tribunal with the concern that a verdict not be

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[9] *Lett*, 644 N.W.2d at 751 (citing *Arizona*, 434 U.S. at 509-10); Pet. App. 54a-55a.

[10] *Lett*, 644 N.W.2d at 746, n.2; Pet. App. 42a.

[11] *Lett*, 644 N.W.2d at 745; Pet. App. 41a.

coerced.[12] Otherwise, trial courts are forced to "navigate a narrow compass between Scylla and Charybdis. . . . [This will] make [trial courts] unduly hesitant conscientiously to exercise their most sensitive judgment . . . ."[13]

Lett's contentions that "[o]ne is hard pressed to imagine a trial judge doing less" and that the trial court's actions here "were so insufficient, and the record so devoid of facts" as not to support a mistrial declaration, Resp. Br. pp. 15, 20, are simply hyperbole and belied by a fair reading of the facts.[14]

Most importantly, Lett fails to show that the Michigan Supreme Court's decision was "objectively unreasonable."[15] The Michigan Supreme Court properly determined that "[t]he reasons were plain and obvious: the jury foreperson indicated that the jury was not going to be able to reach a unanimous verdict."[16] Relying on this Court's language that the trial court cannot act irrationally, irresponsibly, precipitately, or for reasons unrelated to the trial

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[12] *Arizona*, 434 U.S. at 509.

[13] *Gori v. United States*, 367 U.S. 364, 369-70 (1961).

[14] Further, Lett's contention that this Court should place great stock in the assistant prosecuting attorney's statement at the post-conviction bond hearing about the propriety of the mistrial declaration is unpersuasive. This Court has never found that counsel's on-the-spot statements made at oral argument control the legal analysis. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 170 (1972). Just as the Michigan Supreme Court ruled against Lett on the merits of his double-jeopardy claim without addressing his possible consent or waiver, it did not find these statements controlling.

[15] 28 U.S.C. § 2254(d)(1).

[16] *Lett*, 644 N.W.2d at 754; Pet. App. 61a

problem, and must act deliberately, the Michigan Supreme Court's decision was not objectively unreasonable.[17]

While another court might view the situation differently after the fact, that does not make the decision objectively unreasonable under § 2254(d)(1). Although "unreasonable" at times might be difficult to define, "it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning."[18] And the term must be considered in the greater context that, in habeas, federal courts are to give State court decisions "the benefit of the doubt."[19] Thus, a "readiness to attribute error is inconsistent with the presumption that State courts know and follow the law."[20]

The Sixth Circuit, however, improperly fashioned its own factual conclusions: (1) the jury would not have had enough time to review the testimony and deliberate, (2) the serious nature of the crime and punishment warranted longer deliberations,

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[17] These terms are commonly understood as: "Deliberate: studied or intentional: *a deliberate lie*. 2. characterized by deliberation; careful or slow in deciding: *a deliberate decision*. * * * Irrational: 1. lacking the faculty of reason; deprived of reason. 2. lacking sound judgment or logic. * * * Irresponsible: 1. said, done, or characterized by a lack of a sense of responsibility. 2. not capable of or qualified for responsibility. * * * Precipitate: 1. to hasten the occurrence of; bring about prematurely or suddenly: *to precipitate a crisis*." *Random House Webster's College Dictionary* 352, 700, 701, 1040 (2001).

[18] *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (O'Connor, J. for the Court).

[19] *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002).

[20] *Woodford*, 537 U.S. at 24.

(3) juries often initially express deadlock but reach a verdict later.[21] When the Sixth Circuit created a three-part test with new requirements not present in this Court's clearly-established precedent in habeas and second-guessed the predicate factual determinations, a finding of unreasonableness was inevitable.

II. This Court's clearly-established precedent holds that a trial court's exercise of sound discretion to discharge a jury should be deferred to.

Since *Perez* 186 years ago, this Court has held that – considering all the circumstances – it is within a trial court's exercise of sound discretion to discharge a deadlocked jury.[22] This long-held proposition properly recognizes the defendant's valued right to have his case decided by a single tribunal, society's interest in vindicating its laws, and the avoidance of coerced verdicts obtained by forced deliberations.[23] This Court has indicated that there is no mechanical test.[24]

A deadlocked jury determination is at the extreme end of the spectrum of reasons for declaring a mistrial, warranting the least amount of scrutiny.[25] Even in cases not involving deadlocked juries, this Court has "consistently declined to scrutinize with

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[21] *Lett v. Renico*, 316 F. App'x 421, 427 (6th Cir. 2009); Pet. App. 13a.

[22] *Perez*, 22 U.S. (9 Wheat.) at 580.

[23] *Arizona*, 434 U.S. at 509-10; *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949).

[24] *Illinois v. Somerville*, 410 U.S. 458, 462 (1973).

[25] *Arizona*, 434 U.S. at 508-09.

sharp surveillance the exercise of that discretion."[26] It is one decision that historically has been "accorded great deference" and "special respect."[27] As long as the record provides "sufficient justification," there is no basis to second-guess.[28]

This Court has stated, "Judicial wisdom counsels against anticipating hypothetical situations in which the discretion of the trial judge may be abused and so call for the safeguard of the Fifth Amendment . . . ."[29] Although this Court has not clearly adopted a set definition of what is not the exercising of sound discretion – or stated differently, what is an abuse of discretion – it has identified some explanatory terminology.

For example, although the question before this Court in *Arizona* was whether an improper comment by defense counsel formed a proper basis for a mistrial, this Court concluded that, in a deadlocked jury scenario, declaration of a mistrial warrants close scrutiny "*if the trial judge acts for reasons completely unrelated to the trial problem which purports to be the basis for the mistrial ruling* . . . ."[30] This proposition parallels this Court's later expression of what is *not* sound discretion. In *Arizona*, this Court identified some examples, concluding, "Thus, if a trial judge acts

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[26] *Gori*, 367 U.S. at 368.

[27] *Arizona*, 434 U.S. at 510.

[28] *Arizona*, 434 U.S. at 516-17.

[29] *Gori*, 367 U.S. at 369.

[30] *Arizona*, 434 U.S. at 510 n.28 (emphasis added) (citing *United States v. Gordy*, 526 F.2d 631, 633, 636-37 (5th Cir. 1976) (hectic trial pace to accommodate docket considerations and the judge's expressed concern regarding imminent travel plans)).

irrationally or *irresponsibly*, cf. *United States v. Jorn*, . . . ; see *Illinois v. Somerville*, . . . , his action cannot be condoned."[31] Further, this Court in *Arizona* also used "precipitately" and "deliberately."[32] Unlike Lett, the State of Michigan does not assert that these terms are a test, but rather, they are helpful in providing definition to what an abuse of discretion might be.[33] Resp. Br. p. 22.

On the second prong of § 2254(d)(1), the decision of the Michigan Supreme Court here must not be just "incorrect," it must also be "objectively unreasonable."[34] Further, this Court has also consistently distinguished between State court decisions applying a general, constitutional standard and those decisions that apply a narrow rule. Where a broad standard is involved, State court decisions are given greater leeway.[35] Here, the Michigan Supreme Court's decision was not objectively unreasonable because the State court correctly identified the applicable legal rule from this Court's precedent and reasonably applied it to the facts.[36]

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[31] *Arizona*, 434 U.S. at 514 (emphasis added).

[32] *Arizona*, 434 U.S. at 515-16.

[33] There is no universal meaning of the phrase "abuse of discretion," and the level of scrutiny it implies varies with the context. Often, courts equate it with clear error – a definite and firm conviction that a mistake has been made. 1 S. Childress & M. Davis, Federal Standards of Review § 4.21. *See also* The Hon. Henry J. Friendly, *Indiscretion about Discretion*, 31 Emory L.J. 747, 763-65 (1982).

[34] *Williams*, 529 U.S. at 409, 411-12 (O'Connor, J. for the Court).

[35] *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *Knowles v. Mizayance*, 566 U.S. ___; 129 S. Ct. 1411, 1420 (2009).

[36] *Williams*, 529 U.S. at 406 (O'Connor, J. for the Court).

III. There is no clearly-established precedent that requires trial courts to take additional measures or force deliberations for some unspecified amount of time, and the Sixth Circuit cannot give greater definition to this Court's general, deferential standard by imposing its own test and new requirements.

A. Clearly established precedent of this Court is to be narrowly drawn.

In challenging his conviction in habeas corpus, Lett was required to demonstrate that the decision of the Michigan Supreme Court was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d). Clearly-established law must be drawn from the holdings of this Court, not from obiter dictum.[37] Further, creation of new obligations not clearly established in this Court's precedent is improper on habeas review. "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law."[38]

In the last two months, this Court has twice reiterated the point that the rule at issue must be one that was specifically established by this Court, and has continued to *narrowly* draw what is "clearly

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[37] *Williams*, 529 U.S. at 403-04 (O'Connor, J. for the Court).

[38] *Yarborough*, 541 U.S. at 666.

established" under 28 U.S.C. § 2254(d).[39] In habeas, "it is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific rule that has not been squarely established by this Court."[40]

B. The Sixth Circuit improperly drew from its circuit precedent and misapprehended this Court's clearly-established precedent that recognizes a deferential standard.

This Court has never clearly established precise, particular steps that a trial court must take in a deadlocked jury case before declaring a mistrial. But the Sixth Circuit mistakenly held it was necessary for the State trial court to employ additional measures before the State court's decision could be an exercise of sound discretion, i.e., give a deadlocked jury instruction, polling the jury, or giving the jury more time to deliberate.[41] But in arriving at this conclusion the Sixth Circuit improperly cited its own precedent instead of this Court's in determining what is clearly established.[42]

The Sixth Circuit concluded that this Court had established a three-factor test, saying:

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[39] *Smith v. Spisak*, 130 S. Ct. 676, 684 (2010); *Thaler v. Haynes*, 175 L. Ed. 2d 1003, 1008 (2010).

[40] *Knowles*, 129 S. Ct. at 1419 (citations omitted) (internal quotes omitted).

[41] *Lett*, 316 F. App'x at 228; Pet. App. 14a-15a.

[42] *Lett*, 316 F. App'x at 226, 228; Pet. App. 10a, 14a.

> In *Fulton v. Moore*, 520 F.3d at 529, we reviewed a habeas petition based on a double jeopardy claim and held that *Arizona v. Washington sets forth three factors that determine whether a judge has exercised sound discretion in declaring a mistrial*: whether the judge (1) heard the opinion of the parties' counsel about the propriety of the mistrial; (2) considered alternatives to a mistrial; and (3) acted deliberately, instead of abruptly.[43]

But this Court has never established these factors as the test for judging all mistrials in any of its cases. Likewise, this Court has never required specific additional measures. The Sixth Circuit criticized the trial court, concluding:

> [T]he record does not indicate that the trial judge gave any consideration to the alternatives to declaring a mistrial, such as giving a "deadlocked jury" instruction, polling the jury, answering the question posed in the jury's note about what would happen if it was unable to reach a unanimous verdict, or allowing the jury more time to deliberate. Any of these courses of action would have been reasonable . . . .[44]

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[43] *Lett*, 316 F. App'x at 226 (emphasis added); Pet. App. 10a.

[44] *Lett*, 316 F. App'x at 228; Pet. App. 14a-15a.

But there are definite risks inherent in (1) polling the jury members,[45] (2) giving a deadlocked jury instruction,[46] or (3) forcing longer deliberations.[47] Pet. App. 14a-15a. In certain circumstances, these might be reasonable, but not always. The trial court is in the best position to exercise discretion and determine appropriate steps before declaring a mistrial. Moreover, to the extent that the Sixth Circuit *required* an express finding on the record, this Court in *Arizona* rejected that proposition. As long as the record demonstrates the basis, nothing more needs to be done by the trial court to justify its decision.[48]

The Sixth Circuit's test demands specific additional steps. Logically, it makes no sense for Lett to claim that the State trial court's actions, as reviewed by the Michigan Supreme Court, were insufficient for

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[45] As Justice Rehnquist recognized in his dissent from the denial of a writ of certiorari in *Winston*, a requirement of additional methods would "create[ ] a principle of law that has never been sanctioned by this Court to the effect that a trial judge must interrogate each juror as to the possibility of reaching a verdict . . . ." *Winston v. Moore*, 452 U.S. 944, 947 (1981) (Rehnquist, J., dissenting). Further, as the Sixth Circuit itself has noted, "The most frequent setting in which the risk of juror coercion arises is when a court inquires into a numerical division of a deadlocked jury." *Lyell v. Renico*, 470 F.3d 1177, 1182 (6th Cir. 2006).

[46] An *Allen* charge comes from *Allen v. United States*, 164 U.S. 492, 501-02 (1896). Whether a formal *Allen* charge or other deadlocked jury instruction, such charges can carry a risk of coercion. As the Sixth Circuit has noted, the trial judge is in the "best position" to determine whether the charge is appropriate, and whether its effect was coercive depends on the circumstances. *United States v. Clinton*, 338 F.3d 483, 487 (6th Cir. 2003).

[47] As this Court recognized in *Arizona*, prolonging deliberations can lead to the risk of a coerced verdict. *Arizona*, 434 U.S. at 509.

[48] *Arizona*, 434 U.S. at 502-03, 516-17.

not doing enough ("[m]ore is required"), while simultaneously claiming that his argument is not advancing the theory that anything specifically more was required. Resp. Br. pp. 17-20. Lett is advancing a theory summarized in his response brief as: "while there is no mechanical formula, something must be done, or something more must exist, beyond what was done and existed here to establish sound discretion." Resp. Br. p. 30. Such argument is inconsistent with a principle that, objectively, the Michigan Supreme Court unreasonably applied this Court's clearly-established precedent.

As the record demonstrates, that "something" exists here and was done. There is the first note, which may reasonably be construed as indicating acrimonious deliberations. There is the second note, which may reasonably be construed as indicating a deadlock. Lastly, there is the trial court's colloquy with the foreperson who – in response to the trial court's question of whether the jury was going to reach a unanimous verdict – plainly and unambiguously answered, "No, Judge." Pet. App. 94a.

It is clear, however, reading the Sixth Circuit's opinion that it was engrafting requirements onto this Court's precedent that are not clearly established. To this, Lett seeks to pile on additional requirements when determining whether a State trial court's actions constituted an abuse of discretion. Lett's attempt to avoid the strictures of § 2254(d)(1)'s clearly-established requirement can be seen in his analysis.

First, Lett quotes Justice Marshall's dissenting opinion from *Arizona* to the effect that alternatives

should be considered when determining whether a trial court abused its discretion. But citation to a dissenting opinion neither qualifies as a holding of this Court, nor does it represent clearly-established precedent. Indeed, Lett ignores the fact that this Court rejected that proposition in *Arizona* that the trial court must make "explicit consideration of alternatives" as long as the record is sufficient to justify the ruling.[49]

Second, Lett proffers citations and quotations to language in various opinions that are divorced from the cases' factual contexts and that do not resolve the question of what is clearly established in order to guide trial courts in their exercise of discretion if, in fact, other measures are required.[50] Moreover, Lett's brief does not provide what the State trial court would have been required to do pursuant to this Court's clearly-established precedent. Lett's difficulty lies in the fact that this Court has consistently refused to establish a mechanical test.[51]

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[49] *Arizona*, 434 U.S. at 502-03, 516-17.

[50] For example, Lett relies on *Jorn*, itself a plurality opinion, where the holding is merely "that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for the sua sponte declaration of this mistrial," and there "reprosecution would violate the double jeopardy provision of the Fifth Amendment." *United States v. Jorn*, 400 U.S. 470, 487 (1971). That holding is consistent and no broader than *Perez*. The mention to the trial court acting "abruptly" cannot be divorced from the underlying facts where the trial court sua sponte and abruptly declared a mistrial due to the trial court's disbelief that witnesses had been adequately warned of their Fifth Amendment rights. *Jorn*, 400 U.S. at 487. In fact, the trial court's actions in *Jorn* were referred to by this Court in *Somerville* as being "erratic." *Somerville*, 410 U.S. at 469.

[51] *Somerville*, 410 U.S. at 462.

Lett cites no clearly-established precedent from this Court that supports the Sixth Circuit's mandate here that the State trial court employ additional measures, force longer deliberations, or that the record must expressly contain the trial court's consideration of other alternatives. By effectively ignoring the clearly-established prong of § 2254(d)(1) – whether the Michigan Supreme Court's decision was an unreasonable application of this Court's clearly established precedent – the Sixth Circuit essentially collapsed the two prongs of § 2254(d)(1) together into one inquiry.[52]

C. Irrespective of the varying guideposts used by the circuits, Lett only produces a handful of readily distinguishable cases where the circuits have found an abuse of discretion when reviewing a mistrial due to a deadlocked jury.

On pages 41-43 of its merits brief, the State of Michigan cited cases from other circuits involving deadlocked juries, which demonstrated that the circuits utilize various considerations to judge the trial court's actions on direct review. Contrary to Lett's position, the circuits are not all consistent. Indeed, it is

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[52] The inquiries of whether a claim can be supported by clearly established law and whether a claim was reasonably adjudicated in the State courts are separate. *House v. Hatch*, 527 F.3d 1010, 1017 (10th Cir. 2008) ("[T]he threshold determination that there is no clearly established federal law is analytically dispositive in the § 2254(d)(1) analysis. That is, without clearly established federal law, a federal habeas court need not assess whether a State court's decision was 'contrary to' or involved an 'unreasonable application' of such law.")

plainly evident that the Sixth Circuit's formulation of a three-part test – (1) heard argument from counsel; (2) considered alternatives to a mistrial; and (3) acted deliberately, instead of abruptly – is dissimilar from all but one of the circuits noted at pages 41-43 of the State of Michigan's opening brief. Further, the circuits recognize that these factors merely provide guidance or are relevant factors and are not a set test, although in essence they operate as a test within the circuit. In the two habeas cases cited on page 39 of the State of Michigan's brief, no set test was applied at all, but rather, the circuits correctly recognized that the trial court is in the best position to determine the classic basis for a mistrial – a deadlocked jury.[53]

The lower courts have not been quick to second-guess trial courts' deadlocked jury determinations, even on direct review and even applying varying guideposts. The cases where reviewing courts have found an abuse of discretion generally fall into two categories: (1) where the trial court acts for reasons unrelated to the deadlock and (2) where, under all of the circumstances, it is apparent that the jury was not indicating it was hopelessly deadlocked.

In the first category, essentially, the trial court has an ulterior reason. Whether completely or in part, the deadlock is a pretext to the trial court's true motivations for ending the trial. That is not the

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[53] *See Fay v. McCotter*, 765 F.2d 475, 477 (5th Cir. 1985); *Lindsay v. Smith*, 820 F.2d 1137, 1155 (11th Cir. 1987).

exercise of sound discretion.[54] Lett concedes that the State trial court here did not possess ulterior motives. Resp. Br. p. 14.

There are only a handful of cases that fall in the second category, i.e., where the facts indicate that the jury was not hopelessly deadlocked. In these cases, the trial court ignored contrary evidence, did not discuss the matter with the jury at all, or the jury did not initiate the expression of a deadlock, rather the trial court did so sua sponte.[55]

Here, there was a note indicating potential acrimonious deliberations and a second note indicating a potential deadlock. There was no contrary evidence. Further, the State trial court here had a colloquy with

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[54] *See, e.g., Gordy*, 526 F.2d at 636-37 (declaring a mistrial after five and one-half hours where there was evidence that the trial court based its decision on docket considerations and travel plans was an abuse of discretion).

[55] *See United States v. Starling*, 571 F.2d 934, 939 (5th Cir. 1978) (ignoring foreperson's expression that the jury had been engaging in deliberations and the fact that the jury had requested more time to deliberate was an abuse of discretion); *United States v. Horn*, 583 F.2d 1124, 1125, 1129 (10th Cir. 1978) (declaring a mistrial after three and one-half hours of deliberations, without discussion with foreperson or jury, and in the absence of evidence of disagreement at the time of the sua sponte ruling was an abuse of discretion); *United States v. Razmilovic*, 507 F.3d 130, 139 (2d Cir. 2007) (declaring a mistrial after a long, complex trial where there was only a single note from the jury regarding deadlock without confirmation from the jury that further deliberations would be unproductive was an abuse of discretion); *United States ex rel. Webb v. Court of Common Pleas*, 516 F.2d 1034, 1036 (3d Cir. 1975) (declaring a mistrial by bringing jury out of deliberations after six and one-half hours, without initiation from counsel or the jury, was an abuse of discretion).

the foreperson where the foreperson clearly expressed the existence of a deadlock and that further deliberations were fruitless. Finally, unlike the other direct review cases, the jury initiated the deadlocked discussion via the second note, and then the foreperson confirmed it.

The State trial court's actions here are distinguishable from these other cases. Lett's argument that "[t]he Sixth Circuit's conclusion that relief was required in this case would have been reached by any reviewing circuit court, as the analyses used by each – even if not identical – are nonetheless compatible and substantially the same," is belied by the distinguishing factors. Resp. Br. p. 26.

Moreover, if Lett's appeal in the Sixth Circuit had been heard by a different panel, the outcome may have been different. Lett fails to acknowledge that within the Sixth Circuit there is disagreement regarding additional measures and whether there are set requirements before a mistrial can be declared. Three recent cases, all in 2007-2008, all involving habeas petitions asserting double-jeopardy bars, in large part contravene the very positions of the Sixth Circuit panel here. Lett did not cite these cases and

they undercut the proposition that certain measures are clearly-established.[56]

Here, the Michigan Supreme recognized and reasonably applied this Court's clearly-established precedent when it concluded that the State trial court had not abused its discretion in discharging the jury because it was hopelessly deadlocked. Lett can neither change the facts that faced the trial court, nor this Court's clearly-established precedent. Both require Lett's argument be rejected.

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[56] *See Klein v. Leis*, 548 F.3d 425, 432-33 (6th Cir. 2008) (recognizing alternatives to a mistrial need not be considered when sufficient justification appears on the record); *Walls v. Konteh*, 490 F.3d 432, 438 (6th Cir. 2007) (recognizing alternatives to a mistrial need not be considered when sufficient justification appears on the record, and that *Arizona* did not hold that declaration of a mistrial without consideration of alternatives was necessarily an abuse of discretion); *Ross v. Petro*, 515 F.3d 653, 669 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 906 (2009) (finding that "[t]he predominant thrust" of *Arizona*'s holding is the broad discretion due the trial court's determination).

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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